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CONTEMPORARY FORMS OF SLAVERY

Systematic rape, sexual slavery and slavery-like practices during armed conflict

Final report submitted by Ms. Gay J. McDougall, Special Rapporteur

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Introduction

1. At its forty-fifth session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, noting the information transmitted to the Sub-Commission by its Working Group on Contemporary Forms of Slavery concerning the sexual exploitation of women, as well as other forms of forced labour, during wartime, decided to entrust Ms. Linda Chavez, as Special Rapporteur, with the task of undertaking an in-depth study on the situation of systematic rape, sexual slavery and slavery-like practices during wartime, including internal armed conflict. The Sub-Commission requested the Special Rapporteur to submit her preliminary report at the forty-sixth session and her final report at the forty-seventh session.

2. At its forty-sixth session the Sub-Commission, considering Commission on Human Rights resolution 1994/103 in which it requested the Sub-Commission to reconsider its decisions to recommend a number of studies, decided to request Ms. Chavez to submit, without financial implications, a working paper on the situation of systematic rape, sexual slavery and slavery-like practices during wartime at its forty-seventh session.

3. Ms. Chavez duly presented her working paper (E/CN.4/Sub.2/1995/38) and the Sub-Commission, in resolution 1995/14, welcomed the paper. The Special Rapporteur submitted her preliminary report at the forty-eighth session (E/CN.4/Sub.2/1996/26), summarizing the purpose and scope of the study, the history of systematic rape as an instrument of policy, relevant international norms, issues of responsibility and liability, forms with jurisdiction to try perpetrators, possible sanctions against violators and possible forms of reparation.

4. In May 1997, Ms. Chavez informed the High Commissioner/Centre for Human Rights that she was not able to submit a final report at the forty-ninth session of the Sub-Commission and expressed her wish that the study be continued by another member of the Sub-Commission (E/CN.4/Sub.2/1997/12). At its forty-ninth session, the Sub-Commission, in its decision 1997/114, appointed Ms. Gay J. McDougall as Special Rapporteur to prepare a final report on systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict. 1/

5. The use of sexual slavery and sexual violence as tactics and weapons of war is an all too common yet often overlooked atrocity that demands consistent and committed action on the part of the global community. Although a wide range of responses is needed, this final report focuses primarily on the development of international criminal law as a fruitful area for effective action at the national and international levels to end the cycle of impunity for slavery, including sexual slavery, and for sexual violence, including rape. This report also advances policy and practical recommendations that may guide the investigation, prosecution and prevention of sexual slavery and sexual violence in armed conflicts.

6. One significant impetus for the Sub-Commission's decision to commission this study was the increasing international recognition of the true scope and character of the harms perpetrated against the more than 200,000 women enslaved by the Japanese military in "comfort stations" during the Second

World War. Recognizing the need to address past, unremedied human rights, humanitarian law and international criminal law violations involving sexual slavery and sexual violence, a full analysis of the continuing legal liability for these crimes against humanity is contained in the appendix to the present reports.

I. PURPOSE AND CONTEXT OF THE REPORT

7. Parties to contemporary armed conflicts, both international and internal, increasingly target civilian populations when waging hostilities. Women, including girl children, comprise a large segment of these targeted and at-risk populations. They are exposed not only to the violence and devastation that accompany any war but also to forms of violence directed specifically at women on account of their gender. Recognizing the historic lack of protection of women's fundamental rights, the World Conference on Human Rights, in the Vienna Declaration and Programme of Action, emphasized that "[v]iolations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law [and] require a particularly effective response".

8. An effective response requires that acts of sexual violence and slavery must be properly documented, the perpetrators brought to justice, and the victims provided with full and effective redress. The appropriate characterizations of these acts as international crimes of slavery, crimes against humanity, genocide, grave breaches of the Geneva Conventions, war crimes or torture is also essential. These crimes have particular legal consequences as *jus cogens* crimes that are prohibited at all times and in all situations. In addition, this report emphasizes that practices such as the detention of women in "rape camps" or "comfort stations"; forced, temporary "marriages" to soldiers; and other practices involving the treatment of women as chattel, are both in fact and in law forms of slavery and, as such, violations of the peremptory norm prohibiting slavery.

A. Purpose

9. The first purpose of this report is to reiterate the call for a response to the use of sexual violence and sexual slavery during armed conflict. It is imperative to acknowledge the immeasurable injury to body, mind and spirit that is inflicted by these acts. During times of peace, women are subjected to all forms of gender-based persecution, discrimination and oppression, including acts of sexual violence and slavery which often go unpunished even in functional criminal justice systems. The horrors that women face greatly expand in number, frequency and severity during armed conflicts, and are not confined to gender-specific abuses. However, it is clear that women do experience a significantly increased risk of violence and slavery of a sexual nature during armed conflict situations - a risk that must not be accepted or tolerated. In addition, at the same time that abuses directed at women increase during armed conflicts, the degree of impunity with which such violence is committed may also increase. This overall deterioration in the conditions of women in armed conflict situations is due not only to the collapse of social restraints and the general mayhem that armed conflict causes, but also in many cases to a deliberate and strategic decision on the

part of combatants to intimidate and destroy "the enemy" as a whole by raping and enslaving women who are identified as members of the opposition group.

10. The second purpose of this report is to emphasize the true nature and extent of the harms suffered by women who are raped, sexually abused and enslaved by parties to an armed conflict. There are legions of documented reports of sexual violence committed against women in armed conflict. Such documentation reveals examples of women being gang-raped in their homes and in front of their family members; women being held in detention centres or military stations and raped numerous times every day for weeks or even months; women being repeatedly raped by soldiers under the guise of "marriage"; women being held captive in situations involving both forced labour (as cooks, porters, minefield sweepers) and forced sex; and reports of women being mutilated, humiliated and tortured sexually before being killed or left to die from their injuries. The veil of silence that surrounds this violence must be lifted through prosecutions and other forms of redress, including compensation, to ensure that justice is done, dignity is repaired and future violations are prevented.

11. The third purpose of this report is to examine prosecutorial strategies for penalizing and preventing international crimes committed against women during armed conflict. This study invents no new crimes or penalties and it proposes no new standards of liability for State or non-State actors. The report primarily restates and reinforces the established law that is already applicable, although not always applied. In addition, the report identifies those areas where further elaboration and development of the existing legal framework would facilitate more effective prosecutions.

12. Notwithstanding the repeated failure of States and international legal bodies to fulfil their obligations to bring the perpetrators of rape and slavery during armed conflict to justice in accordance with international norms and standards that already exist, there is cause for optimism. Advances are being made to end the cycle of impunity. In the aftermath of the Second World War, there were very few prosecutions for slavery and even fewer for rape. At the time of writing of this report, the International Criminal Tribunal for the Former Yugoslavia has issued numerous indictments charging crimes based on sexual violence, and the International Tribunal for Rwanda is under increasing pressure to step up its investigations and prosecutions of sexual violence. In the very period of time during which this report was commissioned and completed, great strides have also been made to address gender-based violence in armed conflict not only in the context of the ad hoc international criminal tribunals, but also with respect to the proposed permanent International Criminal Court. This study, therefore, is offered at a particularly timely juncture in the development of international criminal law and is intended to advance ongoing discussions over proper venues, rules and procedures that may usefully advance prosecutions of sexual violence and slavery by domestic courts, the ad hoc international criminal tribunals and the proposed permanent International Criminal Court. To this end, the definitions of the crimes are set forth in this report with a level of specificity that is intended to assist in identifying the elements of an offence and the level of legal responsibility of each relevant State or non-State actor, including those individuals within a given command hierarchy and those who through their complicitous acts make the offence possible.

B. Context

13. As has been noted by many international legal commentators, the development of international law, including international humanitarian, human rights and criminal law, was based on the paradigm of male lives, particularly the lives of men in the public sphere. 2/ The failure to consider the experience of women resulted in a human rights legal framework which failed to recognize forms of violence directed against women as worthy of international State accountability. However, this legacy of marginalization has begun to shift, as evidenced by the adoption of General Assembly resolution 48/104 of 20 December 1990 in which the Assembly, recalling that the Economic and Social Council had recognized "that violence against women ... had to be matched by urgent and effective steps to eliminate its incidence", proclaimed the Declaration on the Elimination of Violence against Women. Similarly, humanitarian law has inconsistently and inadequately addressed violence against women during times of armed conflict, for example by failing to explicitly articulate rape as a grave breach of the Geneva Conventions. This deficiency has also begun to change as the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, and hopefully too the proposed permanent International Criminal Court, give more attention and redress to violence directed against women.

14. While this report considers the many instances and forms of sexual violence and sexual slavery that may arise in armed conflict situations, the specific mandate of this study concerns the implications of "systematic rape, sexual slavery and slavery-like practices committed during armed conflict, including internal armed conflict". This focus requires an understanding of the following key points.

15. Firstly, it is the internationally accepted view that regardless of whether sexual violence committed in armed conflict occurs on an apparently sporadic basis by marauding soldiers or as part of a comprehensive plan to systematically attack and terrorize a targeted population, all acts of sexual violence, including rape, must be recognized, condemned and prosecuted. Sexual violence and slavery have been used pervasively and consistently in times of war because they are clearly an effective means of demoralizing the opposition. 3/ To undercut the effectiveness of these barbaric acts and practices, the international community must hold those responsible liable for all such violations.

16. Secondly, international humanitarian law as well as municipal laws have often contained provisions for the protection of women's "honour", implying that the survivor of sexual violence is somehow "dishonoured" in the attack. The present report maintains that such characterizations are incorrect, as the only party without honour in any rape or in any situation of sexual violence is the perpetrator. While rape is indeed an assault on human dignity and bodily integrity, it is first and foremost a crime of violence.

17. Thirdly, with respect to the title of this report, the term "systematic" is used as an adjective to describe certain forms of rapes, not to denote the invention of a new crime or a new burden of proof that must be established to prosecute an act of rape. Similarly, the term "sexual" is used in this report as an adjective to describe a form of slavery, not to denote a separate

offence. In this context, the use of the descriptive term "sexual" highlights the historic and contemporary reality that slavery amounts to the treatment of a person as chattel, which often includes sexual access and forced sexual activity. The link between rape and slavery in the mandate for this report is not accidental; many cases of sexual violence committed during armed conflict are most appropriately prosecutable as slavery.

18. Fourthly, this report also recognizes that there is a crucial need to present a comprehensive analysis of the nature and consequences of sexual violence directed against both women and men, with a clear understanding of the gender implications of sexual violence. As noted in the Beijing Declaration and Platform for Action, women are undoubtedly at greater risk of sexual violence and face gender-related obstacles in seeking redress for these violations at all levels and in all legal systems. In addition to the physical and psychological wounds caused by sexual violence, women survivors of sexual violence also encounter gender-specific discrimination and ill-treatment within the family and the community due to the subordination and devaluation of women and girls and of their roles in society. The obstacles that often prevent women from asserting their rights to be free from sexual violence are further compounded by the unwillingness of society to engage in constructive and earnest dialogue on the issues of sex and sexuality in general, and sexual violence in particular. In addition, even more damaging than the veil of silence that surrounds rape and sexual violation is the tendency to marginalize acts of violence when committed against women. By incorporating an understanding of gender, 4/ into the legal framework for responding to systematic rape and sexual slavery, the full range of obligations and legal accountability of all parties to a conflict may be carefully articulated and concrete steps may be outlined to ensure adequate prevention, investigation, and criminal and civil redress, including compensation of victims. 5/

19. The present report exposes the paradox that while the prosecutorial framework exists, and has existed since before the Second World War, there has been a troubling scarcity of prosecutions with respect to acts of sexual violence committed in armed conflict. Some Governments, citing this dearth of prosecutions, claim that the law is new or does not exist. This lack of precedent, however, is more accurately attributable to the failure to respond to acts of violence committed against women, particularly sexual violence, as grievous crimes that must be reported, investigated, prosecuted and compensated to the full extent of the law.

II. DEFINITIONS OF CRIMES

20. The definitions of the crimes of "sexual violence", including "rape", and of "slavery", including "sexual slavery", contained in this report incorporate both the acts themselves and other related forms such as "attempt" and "conspiracy" to commit the offence; "inciting" and "soliciting" others to commit the offence; and "aiding and abetting" the commission of the offence.

A. Sexual violence, including rape

21. Rape falls within the broader category of "sexual violence", which this report defines as any violence, physical or psychological, carried out through

sexual means or by targeting sexuality. 6/ Sexual violence covers both physical and psychological attacks directed at a person's sexual characteristics, such as forcing a person to strip naked in public, mutilating a person's genitals, or slicing off a woman's breasts. 7/

22. Sexual violence also characterizes situations in which two victims are forced to perform sexual acts on one another or to harm one another in a sexual manner. Such crimes are often intended to inflict severe humiliation on the victims and when others are forced to watch acts of sexual violence, it is often intended to intimidate the larger community. For example, the Office of the Prosecutor to the International Criminal Tribunal for the Former Yugoslavia brought charges for violations of the laws of war and crimes against humanity in a case in which a prisoner in a Bosnian Serb prison camp was forced by a guard to bite off the testicle of another prisoner in the presence of a group of other prisoners. 8/ In another case in a different detention facility, a Bosnian Serb police chief was indicted for forcing two detainees to "perform sexual acts upon each other in the presence of several other prisoners and guards." 9/

23. There is no explicit definition of rape in international humanitarian or human rights law, although there are numerous, different formulations of rape in municipal legal systems. 10/ The definition of rape that is advanced in the present study reflects current international elaborations, modern applications, examples derived from municipal law and practice, working definitions of rape that have been submitted by the Office of the Prosecutor to the International Criminal Tribunal for the Former Yugoslavia and to the International Tribunal for Rwanda, and definitions that have been adopted by various international human rights non-governmental organizations.

24. "Rape" should be understood to be the insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim's vagina or anus; or the insertion, under conditions of force, coercion or duress, of a penis into the mouth of the victim. Rape is defined in gender-neutral terms, as both men and women are victims of rape. 11/ However, it must be noted that women are more at risk of being victims of sexually violent crimes and face gender-specific obstacles in seeking redress. Although this report retains "penetration" in the definition of rape, it is clear that the historic focus on the act of penetration largely derives from a male preoccupation with assuring women's chastity and ascertaining paternity of children. It is important, nevertheless, to emphasize that all forms of sexual violence, including but not limited to rape, must be condemned and prevented.

25. Lack of consent or the lack of capacity to consent due, for example, to coercive circumstances or the victim's age, can distinguish lawful sexual activity from unlawful sexual activity under municipal law. The manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negates the need for the prosecution to establish a lack of consent as an element of the crime. In addition, consent is not an issue as a legal or factual matter when considering the command responsibility of superior officers who ordered or otherwise facilitated the commission of crimes such as rape in armed conflict situations. The issue of consent may, however, be raised as an affirmative defense as provided for in

the general rules and practices established by the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda. 12/ The defense in such cases must initially satisfy the judicial body hearing the case that the evidence of consent is "relevant and credible". 13/

26. The term "systematic" is used in this report as an adjective to describe certain forms of rapes, not to denote the invention of a new crime or a new burden of proof that must be established to prosecute an act of rape. An act of rape, in addition to being a crime in its own right, may fall within a larger pattern of widespread or policy-based attacks on a targeted group, thereby establishing the elements of crimes against humanity, as discussed in section III.A. of this report. It is not necessary, however, to prove the occurrence of "systematic rape" in order to prosecute a single act of rape under the rubric of crimes against humanity, just as it is not necessary to prove "systematic murder" or "systematic torture" to establish a claim under crimes against humanity.

B. Slavery, including sexual slavery

27. The 1926 Slavery Convention sets out the first comprehensive and now the most widely recognized definition of slavery. As adapted from the 1926 Slavery Convention, "slavery" should be understood to be the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence.

28. In addition to treaty law, the prohibition of slavery is a *jus cogens* norm in customary international law. The crime of slavery does not require government involvement or State action, and constitutes an international crime whether committed by State actors or private individuals. Further, while slavery requires the treatment of a person as chattel, the fact that a person was not bought, sold or traded does not in any way defeat a claim of slavery.

29. Implicit in the definition of slavery are notions concerning limitations on autonomy, freedom of movement and power to decide matters relating to one's sexual activity. 14/ The mere ability to extricate oneself at substantial risk of personal harm from a condition of slavery should not be interpreted as nullifying a claim of slavery. In all cases, a subjective, gender-conscious analysis must also be applied in interpreting an enslaved person's reasonable fear of harm or perception of coercion. This is particularly true when the victim is in a combat zone during an armed conflict, whether internal or international in character, and has been identified as a member of the opposing group or faction.

30. The term "sexual" is used in this report as an adjective to describe a form of slavery, not to denote a separate crime. In all respects and in all circumstances, sexual slavery is slavery and its prohibition is a *jus cogens* norm. The "comfort stations" that were maintained by the Japanese military during the Second World War (see appendix) and the "rape camps" that have been well documented in the former Yugoslavia 15/ are particularly egregious examples of sexual slavery. Sexual slavery also encompasses situations where women and girls are forced into "marriage", domestic servitude or other forced

labour that ultimately involves forced sexual activity, including rape by their captors. For instance, in addition to the cases documented in Rwanda and the former Yugoslavia, there are reports from Myanmar of women and girls who have been raped and otherwise sexually abused after being forced into "marriages" or forced to work as porters or minefield sweepers for the military. 16/ In Liberia, there are similar reports of women and girls who have been forced by combatants into working as cooks and who are also held as sexual slaves. 17/

31. Sexual slavery also encompasses most, if not all forms of forced prostitution. The terms "forced prostitution" or "enforced prostitution" appear in international and humanitarian conventions but have been insufficiently understood and inconsistently applied. "Forced prostitution" generally refers to conditions of control over a person who is coerced by another to engage in sexual activity.

32. Older definitions of forced prostitution focus either in vague terms on "immoral" attacks on a woman's "honour", or else they are nearly indistinct from definitions that seem more accurately to describe the condition of slavery. Despite these limitations, as the crime is clearly criminalized within the Geneva Conventions and the Additional Protocols thereto, it remains a potential, albeit limited alternative tool for future prosecutions of sexual violence in armed conflict situations.

33. As a general principle it would appear that in situations of armed conflict, most factual scenarios that could be described as forced prostitution would also amount to sexual slavery and could more appropriately and more easily be characterized and prosecuted as slavery.

III. THE LEGAL FRAMEWORK FOR PROSECUTING SEXUAL SLAVERY AND SEXUAL VIOLENCE, INCLUDING RAPE, UNDER INTERNATIONAL LAW

34. The legal framework for prosecuting sexual slavery and sexual violence has evolved from at least three different sources of law, including human rights, humanitarian and international criminal law, each with different customary and treaty-based origins and historic precedents. Because of the subordination of women in societies worldwide, acts of sexual slavery and sexual violence are not always sufficiently reflected in the explicit language of international criminal provisions, including those prohibiting slavery, crimes against humanity, genocide, torture and war crimes. 18/ This report examines the multiple sources of authority which do exist to ground international and national prosecutions of sexual slavery and sexual violence committed during armed conflict.

35. The framework for prosecuting international crimes often borrows and builds upon practices at the municipal level. In some cases, the policy concerns for prosecuting international crimes are similar to the concerns underlying national prosecutions. However, in many cases, international criminal law seeks to advance policy goals which are specific to the needs of international or transnational action. Thus, it is not always appropriate to extrapolate international standards from municipal legal systems. The present report focuses on crimes arising in the context of armed conflict and while many of them are prosecutable as peacetime offences under municipal laws, the

legal analysis required to prevent, investigate and prosecute sexual slavery and sexual violence during armed conflict is motivated by policy concerns particular to the international legal context.

36. Sexual slavery and sexual violence when committed during armed conflict may be characterized under certain conditions as customary violations of *jus cogens* norms. The Vienna Convention on the Law of Treaties in article 53, defines *jus cogens* norms as those standards that are "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". In addition, *jus cogens* norms are recognized as delicts of universal concern, so that any State may properly prosecute *jus cogens* offences, even if the prosecuting State lacks any link to the nationality of the offender or the victim or any territorial connection to the commission of the crime and could not otherwise properly assert jurisdiction.

37. The various international crimes that correspond to violations of these *jus cogens* norms include slavery, crimes against humanity, genocide, certain war crimes and torture. 19/ These crimes are subject under customary international law to universal jurisdiction and they are exempt in most cases from the effect of any statute of limitations to prosecutions. 20/ States, including successor Governments, have an obligation to ensure that those who violate such norms do not do so with impunity and are brought to justice, either by prosecution within the State or extradition for prosecution in another State. 21/ Although war crimes by definition require a nexus to armed conflict, the prohibitions against slavery, crimes against humanity, genocide and torture apply in all situations, including in all armed conflicts, internal strife and peacetime.

A. Crimes against humanity

38. A widespread or systematic 22/ attack against a civilian population - including widespread or systematic persecution based on racial, ethnic, religious, political or other grounds - may be prosecuted as a crime against humanity. 23/ It is significant to note that although crimes against humanity have most often been charged in armed conflict situations, they do not require a nexus to any armed conflict. 24/ In addition, both State and non-State actors can be prosecuted for crimes against humanity.

39. Proof of policy, plan or design is generally considered to be a necessary element of a prosecution for crimes against humanity. 25/ The failure to take action to address widespread or systematic attacks against a civilian population can be sufficient to establish the requisite element of policy, plan or design.

40. In order to more effectively and responsively address widespread or systematic attacks on a population in which sexual slavery and sexual violence are used as tactics, gender should be recognized as one of the grounds of persecution under crimes against humanity. Excluding any group capable of being targeted from the protection of international norms because some aspect of their individual or collective identity has not been formally or explicitly recognized is inexcusable under fundamental principles of justice. 26/ Thus,

current enumerations of prohibited grounds of persecution should be considered illustrative rather than exclusive, and gender, along with other targeted group identities, should be considered protected under crimes against humanity.

41. Sexual violence, including rape, falls within the general prohibition of "inhumane acts" 27/ in the traditional formulation of crimes against humanity, as taken from the Charter of the International Military Tribunal at Nürnberg (Nürnberg Charter), Control Council Law No. 10, and the Charter of the International Military Tribunal for the Far East (Tokyo Charter). 28/ Unfortunately, sexual violence was rarely prosecuted as a crime against humanity following the Second World War.

42. In more recent codifications, rather than relying on residual provisions prohibiting inhumane acts, rape has been listed explicitly as a crime against humanity when committed in the course of either an internal or an international armed conflict and directed against any civilian population, even though it is now well established that crimes against humanity do not require any nexus to armed conflict at all. In particular, the statutes of both ad hoc international criminal tribunals established in 1993 and 1994 to prosecute international crimes occurring in the former Yugoslavia and in Rwanda list rape independently as a separate qualifying offence under the definition of crimes against humanity. Both tribunals, moreover, have brought charges for crimes against humanity based on sexual violence.

43. A single case of serious sexual violence, including rape, may be grounds for prosecution for crimes against humanity, so long as prosecutors link that single violation to a larger series of violations of fundamental human rights or humanitarian law that evidence a widespread or systematic attack against a civilian population.

44. Slavery has long been recognized as a crime against humanity. The Nürnberg Charter and Control Council Law No. 10, which was established to facilitate national prosecutions of war criminals in Germany following the Second World War, both listed enslavement under the sections addressing crimes against humanity. Similarly, article 5 of the Tokyo Charter also listed enslavement and other inhumane acts committed against any civilian population as crimes against humanity. More recent codifications of crimes against humanity include article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia 29/ and article 3 of the Statute of the International Tribunal for Rwanda, 30/ both of which explicitly list enslavement as constituent offences of crimes against humanity.

45. The International Criminal Tribunal for the Former Yugoslavia has recently brought an indictment for slavery as a crime against humanity, charging a member of an elite Serb paramilitary unit and a paramilitary leader in the town of Foca with crimes against humanity for acts of rape and slavery. 31/ The defendants are charged with detaining nine women in a private apartment where the women were sexually assaulted on a regular basis and forced to work both inside and outside of the home. According to the indictment, four of the women were eventually sold to other soldiers. The manner in which these women were detained and ordered to perform manual labour while being subjected to constant sexual assault clearly justifies a charge of

crimes against humanity for slavery. It should be noted, moreover, that the exchange of money for some of the women was not a necessary element of the crime; it merely demonstrated the extent to which the Serb paramilitary soldiers exercised the powers attaching to the right of ownership over the women.

B. Slavery

46. In addition to charging slavery as a crime against humanity or as a war crime, charges of slavery may also be brought on an independent basis against both State actors and private individuals during wartime or peacetime. Indeed, prohibitions against slavery and slave-like practices were among the first prohibitions to achieve the status of peremptory norms of customary international law or *jus cogens*. 32/ The evolution of this fundamental human rights norm began in the nineteenth century and by the beginning of the twentieth century it had already become evident that international prohibitions concerning slavery and the slave trade had attained the status of customary international law. 33/

47. The customary international prohibitions against slavery evolved in part to respond to difficult jurisdictional concerns, since slave traders, like pirates, historically operated on the high seas and were not necessarily subject to the sovereign control or jurisdiction of any single State. As such, the international community recognized the need to attach individual criminal responsibility to all perpetrators of the crime, irrespective of the location of the crime, the level of State involvement or the extent to which the laws or practices of any State may have sanctioned the act. Under international law, therefore, modern prohibitions against slavery allow for pure universal jurisdiction over any State or non-State actor in any case involving slavery or the slave trade. This status may be particularly useful in prosecuting individual cases of sexual slavery committed during armed conflict, as the prosecution in such a case need not establish the existence of State involvement or acquiescence, the existence of a widespread or systematic pattern of abuse, or any nexus between the crime and an armed conflict.

C. Genocide

48. Both in its own right and as a crime against humanity, the prohibition against genocide has clearly attained *jus cogens* status. 34/ Under certain circumstances acts of rape, sexual slavery or other sexual violence may also be characterized as constituent acts of the crime of genocide as defined in article II of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). The key element of the crime of genocide is the specific intent on the part of the perpetrator to physically destroy, in whole or in part, a protected group, namely a national, ethnic, racial, or religious group. Gender is not listed as a protected group under the Genocide Convention. Nonetheless, targeting a protected group through attacks against its female members is sufficient to establish the crime of genocide.

49. The prosecution need not establish an intent to destroy the entire group on a national or an international basis. The intent to destroy a substantial portion or an important subsection of a protected group or the existence of a

protected group within a limited region of a country is sufficient grounds for prosecution for genocide. Moreover, as national borders may be fluid during periods of conflict, it is apparent that nearly all localized campaigns of genocide will likely emphasize the total or eventual elimination of the group as a whole and will often be linked to a larger national campaign to accomplish this goal of annihilation.

50. It is also important to note that the necessary genocidal intent may be inferred from the perpetrator's actions. The Commission of Experts established pursuant to Security Council resolution 780 (1982) to examine violations of humanitarian law in the conflict in the territory of the former Yugoslavia found that in some cases of genocide "there will be evidence of actions or omissions of such a degree that the defendant may reasonably be assumed to have been aware of the consequences of his or her conduct, which goes to the establishment of intent". 35/

51. The Office of the Prosecutor for both the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda has filed charges based on sexual violence and rape as constituent acts of the crime of genocide. These charges have been brought against persons accused of actually committing the acts as well as against superior authorities in the same chain of command.

52. With the necessary intent element, even a single act of rape may theoretically be grounds for a prosecution for the crime of genocide, provided the act was related to a larger series of acts, all of which were designed to bring about the destruction of a targeted group. 36/ In addition, the crime of genocide does not require any nexus to armed conflict or to State action.

D. Torture

53. Prohibitions against torture have also emerged as *jus cogens* norms from which no derogation is permitted. As prohibited by customary norms, the crime of torture requires the intentional infliction of severe mental or physical pain or suffering, and a nexus to government action or inaction. In most, if not all cases described in this report, rape and serious sexual violence during armed conflict may also be prosecuted as torture. 37/ In addition, the European Court of Human Rights, the Inter-American Commission on Human Rights and numerous domestic courts have also found acts of custodial rape to constitute torture.

54. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (the Torture Convention) defines torture in article 1 as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him [or her] or a third person information or a confession, punishing him [or her] for an act he [or she] or a third person has committed or is suspected of having committed, or intimidating or coercing him [or her] or a third person, or for any other reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

55. The Committee on the Elimination of Discrimination against Women has recognized that violence directed against a woman because she is a woman, including "acts that inflict physical, mental or sexual harm or suffering", represents a form of discrimination that seriously inhibits the ability of women to enjoy human rights and freedoms. 38/ Accordingly, in many cases the discrimination prong of the definition of torture in the Torture Convention provides an additional basis for prosecuting rape and sexual violence as torture.

E. War crimes

56. As a category of international crimes, war crimes include grave breaches and other violations of the Geneva Conventions of 1949, violations of the Hague Convention and Regulations of 1907, as well as violations of the laws and customs of war. Acts of sexual slavery and sexual violence may constitute war crimes in certain cases. Unlike slavery, crimes against humanity, genocide and torture - war crimes by definition - require a nexus to armed conflict, and the most extensive humanitarian law protections of civilians and combatants are provided during armed conflicts of an international character. However, those offences which would constitute violations of *jus cogens* norms are prohibited during all armed conflicts, regardless of the nature or level of the hostilities.

1. War crimes in international armed conflicts

57. The grave breaches provisions of the Geneva Conventions have both attained the status of customary international law, 39/ and many grave breaches and other provisions of the Geneva Conventions have also attained the status of *jus cogens*. 40/ It is important to recognize that "[e]ach High Contracting Party [to the Geneva Conventions] shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts". 41/ To the extent that the grave breaches provisions may be applied, along with their procedural aspects, as customary international law in international armed conflicts, this obligation also applies to States that are not parties to the Conventions.

58. Acts of sexual violence, including rape, when committed by enemy or occupying forces during the course of an international conflict, 42/ may constitute grave breaches of the Geneva Conventions. 43/ The International Committee of the Red Cross has noted that rape is "obviously" covered by the grave breaches provision of article 147 of the Fourth Geneva Convention, which prohibits "wilfully causing great suffering or serious injury to body or health". 44/ In addition, rape is prohibited by the grave breaches provisions concerning torture or inhuman treatment. 45/

59. Rape is also explicitly prohibited in article 27 of the Fourth Geneva Convention, which states that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault", and in article 76 (1) of Additional Protocol I which states that "[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault".

60. In addition to provisions addressing rape in the Geneva Conventions, the 1907 Hague Convention No. IV concerning the Laws and Customs of War on Land, which clearly is considered to have attained the status of customary international law, 46/ ensures in article 46 of its annexed Regulations protection for "family honour and rights" and should be read to cover the crime of rape. It is important to note, however, that the notion of rape as a violation of honour, rather than as an act of violence, obscures the violent nature of the crime and inappropriately shifts the focus toward the imputed shame of the victim and away from the intent of the perpetrator to violate, degrade and injure. Article 46 of the Hague Regulations, moreover, is neutral as to gender and applies to both female and male victims of sexual violence committed during armed conflict.

61. The International Military Tribunal at Nürnberg, countering arguments that the Hague Convention should not be applied by the Nürnberg Tribunal as several of the belligerents in the war were not parties to the Convention, found that the prohibitions in the Hague Regulations were "recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in article 6 (b) of the [Nürnberg] Charter". 47/

62. Following the Second World War, a Netherlands court in Batavia found Japanese military defendants who had participated in enslaving 35 Dutch women and girls in "comfort stations" during the Second World War guilty of war crimes for acts including rape, coercion to prostitution, abduction of women and girls for forced prostitution, and ill-treatment of prisoners. 48/ In a more modern context, as noted above both the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda have issued a number of indictments charging persons with war crimes based on sexual violence.

63. Enslavement has also long been recognized as a war crime, as evidenced by the Nürnberg Charter and decisions of the Nürnberg Tribunal. The 1945 Nürnberg Charter listed civilian deportations for "slave labour" as a war crime under article 6 (b), and most slave labour prosecutions under that article made reference to earlier prohibitions contained in the 1907 Hague Regulations. 49/

64. The Geneva Conventions of 1949 may also be read broadly to prohibit slavery, including sexual slavery, under the grave breaches provisions of the Conventions. 50/ Although slavery, like rape, forced prostitution and sexual abuse, has not been explicitly listed as a grave breach in article 147 of the Fourth Geneva Convention, based on an interpretation of article 147 by the International Committee of the Red Cross, "inhuman treatment" should be read broadly to include such offences. 51/ In addition, rape, forced prostitution and other forms of sexual abuse, including slavery for sexual abuse, should also be read into the prohibitions against "torture", "inhuman treatment", "wilfully causing great suffering or serious injury to body or health", and "the unlawful deportation, transfer or confinement of a civilian" - all of which are explicitly included as grave breaches.

65. In a prosecution for slavery as a war crime, the elements needed to prove the necessary indicia of ownership or control may be met by the specific

coercive circumstances of the war, particularly where the victim has been moved against his or her will to a war zone to provide services, other than those forced labour services which may be permitted under the Geneva Conventions or the laws and customs of war. Moreover, as rape is never permitted under humanitarian law, coerced "services" of a sexual nature always constitute violent infractions of humanitarian law.

66. Recently, the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia issued an indictment for slavery against Bosnian Serb soldiers for detaining nine women for the purposes of forced labour and sexual assault. 52/ The indictment notes that the women were free to leave the private home in which they were being detained - they even had a key to the home - but that the women were not able, in any meaningful sense, to flee, since they "had nowhere to go as they were surrounded by Serbs, both soldiers and civilians". 53/

2. War crimes in armed conflicts not of an international character

67. The majority of the world's contemporary armed conflicts are non-international, or internal, in character. 54/ Recent examples of sexual violence committed during internal conflicts include numerous reports of sexual violence committed following the military coup against the Government of President Aristide in Haiti; sexual violence during the 15-year conflict in Peru between government forces and the Shining Path rebels; and sexual violence in the ongoing hostilities in Algeria, Myanmar, Uganda and southern Sudan. In Algeria, reports suggest that armed groups have abducted women and girls for forced, temporary "marriages" in which the captive women and girls are raped, sexually abused and often mutilated and killed. In Uganda, there are reports that the Lord's Resistance Army abducts children as soldiers and labourers and forces young girls into sexual slavery. These egregious examples of sexual slavery and sexual violence illustrate the need for protection of civilians and combatants during conflicts not of an international character.

68. Since at least 1907, with the adoption of the Martens clause in the preamble to the Hague Convention No. IV, the international community has recognized that even in those conflicts or situations that are not covered by humanitarian treaty provisions, both combatants and civilians "remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience". In particular, Common article 3 of the Geneva Conventions, which constitutes customary international law, sets out those protections that all parties to a conflict must respect, including all parties to internal conflicts that are not otherwise covered by the Geneva Conventions. The provisions of Common article 3 are significant, as they regulate the conduct of both State and non-State actors in internal conflicts. As noted in an analytical report of the Secretary-General on the subject of minimum humanitarian standards, the importance of the basic protections contained in both the Martens clause and in Common article 3 "should not be underestimated" (E/CN.4/1998/87, paras. 74, 85).

69. Article 27 of the Hague Convention No. IV and Common article 3 of the Geneva Conventions clearly prohibit as a matter of customary international law acts of sexual violence and rape by State and non-State actors when committed in internal or international armed conflict. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has recently confirmed this position, ruling that Common article 3 as well as all of the provisions of the Hague Convention apply broadly as customary law in all international as well as internal armed conflicts. 55/ This position is also supported by an important decision in a case before the International Court of Justice in which the Court found that the prohibitions contained in Common article 3 constitute "elementary considerations of humanity" that must be respected in all armed conflicts. 56/

70. Despite the broad coverage of Common article 3, there has been some concern that the application of Common article 3 to internal conflicts may be complicated by restrictive interpretations of the general reach of the Geneva Conventions. There is no doubt that in the context of the Geneva Conventions, both Common article 3, which lists protections that must be afforded in armed conflicts that are "not of an international character", and Additional Protocol II, which "develops and supplements" Common article 3, cover acts of sexual violence and rape committed in internal conflict. 57/ The problem, however, is that the Geneva Conventions generally fail to identify the level of conflict or internal strife that may be necessary to trigger the application of the provisions of Common article 3. 58/

71. Some commentaries by the International Committee of the Red Cross and others have suggested that the threshold of violence that may be needed to trigger the application of Common article 3 is quite substantial. In the most restrictive view, the application of Common article 3 demands an armed conflict that is substantially similar in character to an international armed conflict, "with armed forces on either side engaged in hostilities". 59/ The discussion of Common article 3 that is contained in Additional Protocol II is also quite restrictive, noting, in particular, that Additional Protocol II, "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" that do not qualify as armed conflicts (art. 1 (2)). Under these restrictive views, therefore, the levels of strife that often exist in internal conflicts might not always be sufficient to trigger the direct application of Common article 3 or Additional Protocol II in a given conflict.

72. Despite these concerns, this study understands that the application of Common article 3 was always intended to be broad 60/ and that the existing humanitarian law standards contained in Common article 3 must be applied to all conflict situations. The international community must not underestimate the importance of Common article 3 and, in the absence of new and equally forceful humanitarian standards that may be applied to all levels of internal conflict, the international community should endorse a broad understanding of both the application of Common article 3 to all State and non-State armed groups in all conflicts and the wide-ranging protections that are actually provided under Common article 3.

73. In addition to those humanitarian standards that may be applied to internal armed conflicts, it is also important to recognize that in all cases,

regardless of the level or even the absence of armed conflict, sexual violence may also be prosecuted under existing legal norms as slavery, crimes against humanity, genocide or torture. Moreover, as these crimes may be prosecuted in any available jurisdiction, the absence of an immediately functioning judicial forum in the State where the crimes are being committed does not in itself limit the ability of the international community to try the perpetrators of such violations in other functioning national or international forums.

IV. HOLDING INDIVIDUALS RESPONSIBLE

74. History teaches that a broad range of actors contribute to the commission of international crimes during armed conflict and that the condemnation of responsible parties at all levels is essential to the prevention of international crimes. In order to place responsibility where it can achieve the policy goals of prevention, deterrence and protection, the present report recognizes that there are several overlapping and interlocking categories of responsibility for egregious international crimes, particularly those of mass victimization.

75. The most obvious category of liability for international crimes attaches to those who actually commit acts of sexual slavery or sexual violence during armed conflict which constitute slavery, crimes against humanity, genocide, war crimes or torture. The liability of these perpetrators is determined by proving the elements of the offence, including the necessary mens rea such as specific intent. Liability can also be found for related forms of the international crimes, such as attempt or conspiracy to commit the offence, or inciting, soliciting or aiding and abetting the commission of the offence. Importantly, the fact that a perpetrator acted under superior orders is not a defence to the crime, though it may be considered in mitigating punishment. 61/

76. Under the legal doctrine of command responsibility, commanders, superiors and other authorities are liable for crimes perpetrated by their subordinates. Any commander or other responsible authority who orders a subordinate to commit acts of sexual slavery or sexual violence, or who otherwise knew or should have known that such acts were likely to be committed and failed to take steps to prevent them, may be held fully responsible for the commission of the international crimes which those acts constitute, including war crimes, crimes against humanity, slavery, genocide or torture. 62/ The law of command responsibility relates to acts of rape and sexual violence as it does to all other serious violations of international criminal law. For example, with respect to violations committed by warring parties in the former Yugoslavia, a United Nations Commission of Experts that was charged with investigating violations of humanitarian law in the region specifically concluded that:

> "The practices of 'ethnic cleansing', sexual assault and rape have been carried out by some of the parties so systematically that they strongly appear to be the product of a policy. The consistent failure to prevent the commission of such crimes and

> the consistent failure to prosecute and punish the perpetrators of these crimes, clearly evidences the existence of a policy by omission. The consequence of this conclusion is that command responsibility can be established." 63/

77. The level of formality or organization of the command hierarchy is irrelevant so long as there is some chain of command for the transmittal of orders and the supervision of subordinates. Further, notions of command responsibility are not limited to military or paramilitary structures and many of the persons found to be in command positions are political leaders, government officials and civilian authorities.

78. For example, the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia indicted the highest-ranking civilian officer in a municipality in Bosnia and Herzegovina who "knew or had reason to know" that the Chief of Police in the area was about to force others to commit acts of sexual assault or had done so and failed to take "necessary and reasonable measures" to prevent such acts or to punish the Chief of Police after the acts came to his attention. 64/ In that case, the civilian administrator was charged with responsibility for the acts or the omissions of the Chief of Police, including crimes against humanity for acts of rape and other forms of sexual assault, including male sexual assault. 65/

79. Thus, the law of command responsibility fully applies to all those in high-level positions with the authority to make decisions, formulate policy and influence the issuance of directives within the State, region or locale where international crimes are being committed. Holding commanders, superiors and other authorities to a "knew or should have known" standard is appropriate for assessing liability at this level, and where acts of sexual slavery or sexual violence are occurring on a widespread or notorious basis, such defendants will be presumed to have knowledge of the acts and of their international prohibition. Of course, a commander who participates in or is present during the commission of acts of sexual violence is directly liable as a perpetrator, or may be charged with aiding and abetting the commission of the crime.

80. The customary international law of command responsibility is also reflected in the grave breaches provisions of the Geneva Conventions and article 86 (1) of Additional Protocol I which requires all belligerents to "repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so." The critical importance of this obligation under the doctrine of command responsibility is underscored in the context of crimes of sexual violence, as the historic failure of warring parties to repress such violations has contributed to continuing cycles of impunity for acts of sexual slavery and sexual violence in armed conflict.

81. Another category of legal responsibility applies to those persons who instigate, incite or solicit the commission of egregious international crimes. This category of offenders includes those who create the political or social climate which makes the commission of such crimes possible, such as propagandists who perpetuate racial, ethnic, religious, gender or other stereotypes in a manner calculated or likely to bring about violence against

the subjects of such stereotypes. For example, the use of ethnic and gender stereotypes about Tutsi women in newspapers and radio broadcasts is partly blamed by many for fueling the genocide in Rwanda and for the systematic use of sexual violence against women in that genocide. 66/ Not surprisingly, in many victim accounts of rape and other sexual violence from Rwanda and from the former Yugoslavia, the perpetrators were reported as making ethnicity-based sexual remarks about the women before, during and after the assaults. 67/

82. While they are rarely prosecuted, assessing liability of propagandists as instigators of international crimes such as slavery, crimes against humanity or genocide is not a novel endeavour. Propaganda and incitement to genocide was the subject of at least two trials at the Nürnberg Tribunal, and in one case a Nazi publicist was convicted of crimes against humanity for provoking hatred and extermination of the Jews through his anti-Semitic journal. 68/ A standard of specific intent or reckless disregard would seem appropriate in such situations.

83. Yet another category of legal responsibility for individuals applies to those persons who are complicitous in international crimes by carrying out certain acts or functions in the bureaucracy or political process through which slavery, crimes against humanity, genocide, torture and war crimes are made a practical possibility. These offenders are often civilians and are often outside any given chain of command. As their functions or positions may be quite compartmentalized and their actual knowledge of wrongdoing may be incomplete, holding them to a standard of reasonable inquiry is appropriate. For instance, Maurice Papon, a high-level fonctionnaire in the Vichy Government of France during the Second World War, was recently convicted by a French court for complicity in crimes against humanity. 69/ He was sentenced to 10 years' imprisonment and assessed damages of 4.6 million francs (US$ 748,000) for his part in the Holocaust, specifically in administering the paperwork of thousands of Jews deported to concentration camps. Papon's punishment for complicity was not as severe as the punishment would be for an actual perpetrator; however, his unquestioning performance of questionable acts did in fact contribute to crimes against humanity and he was rightly held liable for complicity.

84. Holding persons responsible under the doctrine of complicity is critical, particularly as international crimes involving sexual slavery and sexual violence during armed conflict are often the result of orchestrated policy which is usually implemented on a practical level by bureaucrats, civil servants and other fonctionnaires in the apparatus.

V. OBLIGATIONS TO SEARCH FOR AND PROSECUTE WAR CRIMINALS

85. States, including successor Governments, have an obligation to prosecute slavery, crimes against humanity, genocide, torture and certain war crimes before domestic courts or, as requested by another State or a duly constituted international criminal tribunal, to surrender defendants for trial, regardless of the defendant's civil or military position. As noted in previous sections of this report, these crimes all entail universal jurisdiction and perpetrators may properly be tried before any competent national or international tribunal.

86. To the extent that the violations described in this report may constitute grave breaches of the Geneva Conventions, a Contracting Party to the Conventions is under an additional obligation, according to article 146 of the Fourth Geneva Convention, to "search for persons alleged to have committed, or to have ordered to be committed, ... grave breaches" and to "bring such persons, regardless of their nationality, before its own courts." This obligation may also be applied to States that are not parties to the Geneva Conventions to the extent that it now reflects customary international law applicable at least to all international armed conflicts. The apprehension and prosecution of criminals is one aspect of the general obligation to bring perpetrators of international crimes to justice, and other aspects may include compensation of victims and other forms of redress, as discussed in section VI below. By fulfilling the obligation to bring perpetrators of international crimes to justice, States take an important and necessary step towards eradicating sexual slavery and sexual violence during armed conflict.

87. It is well established that there are no statute of limitation barriers to prosecutions for serious crimes under international law. The Special Rapporteur of the Sub-Commission on impunity of perpetrators of violations of civil and political rights, Mr. Louis Joinet, noted in his final report to the Sub-Commission that "[p]rescription is without effect in the case of serious crimes under international law ... [and] it cannot run in respect of any violation while no effective remedy is available" (E/CN.4/Sub.2/1997/20/Rev.1, para. 31). This modern position is a natural extension of the Nürnberg Tribunal precedent and is reaffirmed in international treaties addressing the subject and prohibiting the application of statutory limitations to certain war crimes and crimes against humanity, such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) and the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (1974). A number of domestic courts have in fact continued to convict Nazi war criminals for international crimes committed nearly 50 years ago during the Second World War despite defence arguments based on statute of limitations concerns. 70/ Similar reasoning prevents statute of limitations barriers to claims for compensation for gross violations, as discussed below.

VI. THE RIGHT TO AN EFFECTIVE REMEDY AND THE DUTY TO COMPENSATE

88. The Special Rapporteur of the Sub-Commission on the right to reparation for victims of gross violations of human rights and humanitarian law, Mr. Theo van Boven, noted in his revised set of basic principles and guidelines that all victims of serious violations of international law have a right to fair and adequate reparations, which "shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations" (E/CN.4/Sub.2/1996/17, para. 7). Reparations, as defined in international law and as used throughout the present report, refers to all measures expected to be taken by a State which has violated international law, including payment of monetary compensation to victims, punishment of wrongdoers, apology or atonement, assurances of non-repetition, and other forms of satisfaction proportionate to the gravity of the violations. 71/

89. The right to an effective remedy is clearly essential in overcoming impunity and non-accountability for sexual slavery, rape and other acts of sexual violence in armed conflict, and the rights of victims of these atrocities must be vindicated and redressed. The failure to provide any forum or mechanisms for the redress of rights violations would clearly constitute a further violation of international norms and obligations, as would any discrimination against women in exercising their rights to redress. For instance, it is contrary to the principles of international law for municipal law, including customary law, to provide that only male relatives can claim and receive compensation on behalf of women victims of rights violations. Women must be legally entitled, on an equal basis with men, to claim and receive compensation on their own behalf.

90. Similarly, Mr. van Boven concluded that statutes of limitations for the consideration of compensation claims shall not run during periods during which no effective remedies exist (E/CN.4/Sub.2/1996/17, para. 9). Mr. van Boven also noted that under the current state of international law, civil claims relating to reparations for gross violations of human rights and humanitarian law shall not be subject to statutes of limitations in any event (ibid.). The internationally accepted principle that there are no statute of limitations barriers to the prosecution and compensation of serious violations of human rights and humanitarian law is significant given the concern that women who have suffered serious violations, including sexual slavery, often face particularly grave social and legal obstacles to coming forward in a timely manner. Such obstacles are significantly exacerbated when Governments or warring entities conceal the true nature or the scope of the violations.

VII. PROSECUTIONS AT THE NATIONAL LEVEL

A. Significance of national prosecutions

91. In addressing the issue of impunity, it is important to note that wherever national courts have established adequate procedural mechanisms to safeguard the rights of both the victims and the defendants, national prosecutions for human rights and humanitarian law violations may often be preferable to prosecutions before international tribunals. In 1973, the General Assembly adopted resolution 3074 (XXVIII) entitled, "Principles of international cooperation in the detention, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity", in which it noted in particular that "[e]very State has the right to try its own nationals for war crimes or crimes against humanity." This principle also applies to cases of sexual violence, although the international community must recognize that crimes of a violent sexual nature require specific procedural and evidentiary safeguards to ensure that national prosecutions adequately respond to the violations.

92. There are clearly several overlapping concerns that must be considered when deciding whether to charge acts of sexual slavery and sexual violence during armed conflict in an international rather than a national tribunal. In general, national prosecutions in the jurisdiction in which the crime was committed for acts of sexual slavery and sexual violence during armed conflict, if conducted in gender-sensitive ways, are often more likely to satisfy the fundamental rights of the victims to know the truth of what

occurred and should therefore be preferred in most cases over international prosecutions (E/CN.4/Sub.2/1997/20/Rev.1, para. 16). Nonetheless, whenever possible, these cases should be tried in domestic courts as international crimes rather than municipal crimes, with alternative charges under municipal law in case the necessary elements of the international crime cannot be established.

93. In some cases the egregious nature or massive scale of the violations may suggest that only a prosecution by an international tribunal would appropriately reflect the injury that the crimes inflicted on the global community. This is particularly true with respect to proceedings against senior political or military leaders who stand accused of having committed or having ordered the commission of crimes on a massive scale in violation of *jus cogens* norms, including acts of sexual slavery and sexual violence. As matters of universal concern that may be tried properly in any forum, massive criminal violations of peremptory norms of customary international law are properly a focus of the international community as a whole and should, in these most extreme cases, be addressed in international criminal proceedings.

94. In cases involving claims of sexual slavery or sexual violence, local prosecutions may be more effective in preventing future violations, while facilitating the return of victims to their pre-war communities by removing some of the stigma that may often be attached, however improperly, to victims of sexual violence. However, because of culturally maintained gender stereotypes, it is not self-evident that all survivors of such violations will be willing or able to come forward, either because they fear exposing themselves to further stigma or because they fear retaliation. Thus, local tribunals in post-conflict proceedings must be evaluated based on their ability to ensure the rights of both victims and defendants to obtain justice before an independent and impartial tribunal.

B. Common failings of municipal law and procedure

95. A crucial concern in evaluating the competence of national judicial systems to try international crimes is the extent to which the municipal legal system in question adequately protects as a matter of general concern the rights of women to present and argue their legal claims on an equal basis with men in a court of law. In national prosecutions, crimes of sexual slavery and sexual violence committed during armed conflict should generally be tried as international crimes rather than municipal crimes, with the application, therefore, of international procedural rules involving such issues as the admissibility of evidence. Nonetheless, to the extent that some municipal rules of criminal procedure or evidence may still be applied, the existence of gender-based stereotypes and biases in municipal laws or procedures must be taken into account when assessing the general competence of domestic courts to adjudicate violations of human rights and humanitarian law that are directed against women. For example, in some legal systems the crime of rape is not adequately defined as a crime of violence against the person. In other legal systems, evidentiary rules diminish the legal weight that is afforded to the testimony of a woman in a court of law, creating a legal barrier that would necessarily impede the adequate prosecution of crimes committed against women. Also, the general approach that a legal system takes to crimes of sexual violence, including rape and sexual slavery, may be an additional and equally

important factor to consider in evaluating the overall utility of national rather than international prosecutions for acts of rape and sexual slavery committed during armed conflict. For instance, some legal systems emphasize the immoral status of the rape survivors rather than the violent nature of the offence committed by the perpetrator.

96. A general survey of municipal legal systems reveals the following examples of gender-based discrimination codified in criminal laws and justice systems around the world: rape and other forms of sexual assaults that are defined as crimes against the community and not against the individual victim, even though non-sexual assaults are defined as crimes against the individual victim; rape being defined as acts committed by a man against a woman (not his wife), even though men are also victims of sexual violence; procedural laws requiring women to take independent action to initiate prosecutions of rape by the prosecutor's office; evidentiary laws which accord less weight to evidence if presented by a woman; evidentiary laws in rape and sexual assault cases which require women to provide corroborating testimony from men; substantive laws which provide that a married woman who is unsuccessful in proving that she was raped can then be charged with adultery; penalties for sexual violence which allow a man convicted of rape to avoid punishment if he marries the victim; laws which prevent women from serving as judges or as fact-finders; laws which restrict women's access to abortions, contraception or reproductive information; and the absence of adequate, gender-specific witness protection programmes - leaving survivors of sexual and gender violence vulnerable to retaliatory attacks and at the mercy of their male relatives for protection - the very relatives who often regard the survivors as "dishonoured women".

97. Gender bias and discrimination are also embodied in many family and personal status laws worldwide. For example, in some municipal legal systems, women are considered under the legal guardianship of male relatives and denied the legal capacity to contract for labour or services, to hold or dispose of property, or to claim or collect damages for injuries on their own behalf. The focus of humanitarian law on notions of "family honour" serves as a historic link to these contemporary denials of women's individual personhood before the law.

98. In light of these common failings of municipal law and procedure, the present report calls for a broad interpretation of the draft statute of the International Criminal Court (A/CONF.183/2/Add.1) which would require international prosecutions of those crimes within the Court's jurisdiction whenever a State which has jurisdiction over the crimes is unwilling or unable to carry out an investigation or prosecution, or whenever municipal laws or procedures are unavailable or ineffective in securing the rights of the victims to justice and the rights of the defendant to a fair trial.

99. One important factor to consider in evaluating the general competence of a municipal judicial system to adjudicate international crimes, including those involving sexual slavery or sexual violence, is the potential application of the death sentence. As the international community has committed itself to the progressive elimination of death sentences and other barbaric punishments, it would seem contrary to international principles and to the goals of promoting respect for human life and dignity to allow

prosecutions of international crimes in jurisdictions which mandate the death sentence, unless the potential application of the death penalty is waived.

100. Nonetheless, despite these varied and interrelated concerns with respect to municipal legal proceedings, when appropriate, national prosecutions generally remain favoured over international prosecutions for most crimes of sexual slavery or sexual violence as a more effective means of investigating these crimes and preventing future violations. Although the international community now looks forward with great expectation to the imminent creation of a permanent International Criminal Court, it remains imperative that domestic courts continue to prosecute international crimes committed in armed conflicts effectively at the national level, as international proceedings, even before an International Criminal Court, will likely be available only to address a small fraction of the violations that are committed every year.

VIII. RECOMMENDATIONS

101. Ending the cycle of impunity which currently exists for acts of sexual violence and sexual slavery during armed conflict will require political will as well as concerted action by the international community, the United Nations, Governments and non-governmental actors. Developing the effectiveness and availability of the existing legal framework is a critical component of any such action. At least the following practical steps should be pursued immediately.

102. **Legislation at the national level.** States should enact special legislation incorporating international criminal law into their municipal legal systems. Domestic law codifications of international criminal law should specifically criminalize slavery and acts of sexual violence, including rape, as grave breaches of the Geneva Conventions, war crimes, torture and constituent acts of crimes against humanity and genocide. Military regulations, codes of conduct, and training materials for the uniformed and armed services must explicitly address the prohibition of sexual violence and sexual slavery during armed conflict. States should search for and bring to justice all perpetrators of grave breaches of the Geneva Conventions, pursuant to article 146 of the Fourth Geneva Convention. States should, for example, follow the examples of Belgium and Canada and enact legislation providing universal jurisdiction for violations of *jus cogens* norms and other international crimes including sexual slavery and sexual and gender violence committed by State and non-State actors, including armed groups not under State authority. The Sub-Commission, in consultation with other relevant United Nations bodies, should facilitate public reporting by the Secretary-General on steps that have been taken to incorporate humanitarian law into national legal systems and the extent to which national laws provide jurisdiction to prosecute persons who are within the territory or jurisdiction of the State and are accused of having committed grave breaches of the Geneva Conventions, crimes against humanity, slavery, genocide or torture in other countries. The Sub-Commission may wish to request the author of the present report to facilitate the convening of an expert meeting comprised of representatives of Attorneys General, Ministries of Justice, national prosecutors from various legal systems, the Office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia and for the International Tribunal for Rwanda, the Office of the United Nations

High Commissioner for Human Rights and other relevant United Nations programmes, agencies and experts such as the Commission on Crime Prevention and Criminal Justice or the Special Rapporteur of the Commission on violence against women, and other relevant international, governmental and non-governmental organizations to prepare and disseminate guidelines for the effective prosecution of international crimes of sexual violence in proceedings at the national level.

103. **Removal of gender bias in municipal law and procedure.** States must ensure that their legal systems at all levels conform to internationally accepted norms and are capable of adjudicating international crimes and administering justice without gender bias. Municipal courts and formal and customary laws and practices must not discriminate against women in substantive legal definitions or in matters of evidence or procedure. States should review and revise their domestic law and practices to ensure that they promote equal access to justice for women and men and that all levels and branches of their legal systems, including, where relevant, military or religious courts, provide effective remedies and forms of redress for violations of international law, including prosecution of perpetrators and compensation of victims. In furtherance of efforts begun by the various agencies and entities of the United Nations, notably the Special Rapporteur on violence against women, and as reaffirmed in the Beijing Platform for Action, the Sub-Commission, along with other relevant bodies and programmes of the United Nations, should facilitate the publication, on a regular basis, of information on the substantive, evidentiary and procedural barriers at all levels in municipal legal systems to prosecuting violence against women, including sexual violence, highlighting the steps taken to remove these obstacles in conformity with international human rights standards.

104. **Adequate protection for victims and witnesses.** In prosecutions of international crimes at the international or national levels, including those crimes involving sexual violence, it is important to protect victims and witnesses from intimidation, retaliation and reprisals at all stages of the proceedings and thereafter. This is particularly the case when the crimes being prosecuted are international crimes involving allegations of sexual violence and the assailants remain at large in the community. Such protection may require witness relocation programmes or confidentiality of witnesses' identities. Appropriate resources, structures and personnel must be identified for witness protection programmes and support services, including female translators, for victims and witnesses in prosecutions at the national and international level and at all stages of the proceedings (including necessary periods thereafter).

105. **Appropriate support services for victims.** In addition to having their cases investigated and prosecuted, victims of sexual violence must be afforded appropriate support services, including psycho-social counselling, legal aid, emergency medical care and reproductive health services responsive to the devastating effects of sexual violence, including unwanted pregnancies, sexually transmitted disease and mutilation. To the extent that rape continues to be conceived of as an honour violation under various provisions of humanitarian law, it should be seen as a violation of the inherent honour and dignity of all persons. The hazards involved in linking rape to gender-biased concepts of "women's honour" include the risk of marginalizing

the nature of the injury or inadvertently accepting the imputation of shame to the survivor, thereby reducing adequate legal redress and compensation and otherwise complicating all aspects of physical and psychological recovery. Survivors of sexual violence often face ostracism and discrimination from their families and communities, members of whom may consider the victims to be "tarnished" or to have "dishonoured" them in some way, which hinder steps toward reintegration. These destructive attitudes concerning the survivors of sexual violence must be actively dispelled through campaigns undertaken by authorities in conjunction with local women's groups in conformity with international obligations to end demeaning stereotypes regarding women and men. States should review and revise where necessary their asylum and refugee determination procedures to ensure their capacity to recognize as refugees those persons who seek refugee status or asylum based upon a fear of persecution through sexual or gender violence in armed conflict, and to provide access to trained interpreters and legal professionals to facilitate such claims.

106. **The proposed permanent International Criminal Court.** The United Nations High Commissioner for Human Rights should facilitate an ongoing dialogue between persons representing the various entities which will be charged with implementing the statute of the International Criminal Court and the relevant experts of the Commission on Human Rights and the Sub-Commission and the Office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia and for the International Tribunal for Rwanda. To further this dialogue, the High Commissioner should convene a meeting to develop principles and suggest what resources would be necessary to ensure that the investigations and prosecutions of the International Criminal Court proceed with due regard to the need to integrate a gender perspective fully into its content and the recruitment of its personnel. Specific strategies include gender training for personnel at all levels as well as guidelines for prosecution of sexual violence, including effective documentation techniques and work with local non-governmental organizations and women's groups.

107. **Documentation with a view to eventual prosecution.** The Office of the United Nations High Commissioner for Human Rights, operating through field missions and other services, should take the lead in documenting or facilitating the documentation of sexual violence in conflict situations. This will require specific training of United Nations staff and a commitment on the part of the High Commissioner herself to give priority to such documentation efforts. Steps should be taken to ensure the presence of female translators in all monitoring missions undertaken or coordinated by the Office of the High Commissioner, and mechanisms should be implemented to protect the identity of witnesses and victims who do come forward. Any such documentation efforts should be conducted with a view towards potential prosecution of perpetrators and mechanisms should be explored to facilitate such prosecutions in international tribunals. In the documentation of sexual violence committed during armed conflict, a coordinated effort should be made by investigators at the international and national levels, governmental and non-governmental organizations, humanitarian and relief agencies, health care providers, journalists and others to reduce the trauma of victims and witnesses in recounting their stories. The methods of documenting and investigating crimes

of sexual violence should include collecting information from alternative, reliable sources such as local women's groups, human rights monitors and health care providers.

108. **Action at the cessation of hostilities.** At the close of hostilities, it is increasingly the practice for concerned parties to include "human rights chapters" in peace treaties obliging the parties to ratify and observe international human rights instruments and principles. The prosecution of perpetrators and compensation of victims of international crimes committed during armed conflict are generally not contemplated in the peace negotiations and agreements. In fact, amnesty is often granted to those who have committed crimes such as grave breaches of the Geneva Conventions and other war crimes, crimes against humanity, slavery, genocide and torture. Following an armed conflict or other hostilities or circumstances resulting in the transfer of State power, States should explicitly include in peace treaties provisions designed to break the cycle of impunity and to ensure the effective investigation and redress of sexual slavery and acts of sexual violence, including rape, committed during the armed conflict. In addition, peace treaties must not seek to extinguish the rights of victims of human rights violations with respect to claims of compensation and other forms of legal redress unless appropriate administrative schemes for compensation and prosecution are incorporated into the substantive peace agreement. The international community, including the United Nations, must give maximum support to rebuilding effective, accessible and non-discriminatory municipal legal systems following the cessation of hostilities and ensure adequate prosecutions of international crimes committed during the conflict, particularly those involving sexual violence.

109. **The need for an effective, gender-sensitive response.** While international human rights and humanitarian law are largely applicable to all perpetrators of sexual violence and slavery, male or female, the nature and consequences of these crimes as they relate specifically to gender must be incorporated into all legal and extralegal responses, including prevention, investigation, prosecutions, compensation, and the training of persons taking part in armed conflicts. This gender integration is to ensure that no sexual violence is committed with impunity. Clearly, women are often at great risk of sexual violence. This risk is further exacerbated by gender discrimination found within all legal systems and within societies in general, although to varying degrees. This discrimination is particularly likely when the fact of being female is coupled with minority status in terms of ethnicity, race or religion. At the same time, in the context of armed conflict, it is crucial not to overlook the fact that victims of sexual violence most likely will have also suffered violence of a non-sexual nature. Women who have been raped, for instance, should not be characterized solely as "the rape victims" as this ignores the totality of the violations they may have endured. By incorporating an understanding of gender into the legal framework for responding to systematic rape and sexual slavery, the full range of the obligations and legal accountability of all parties to a conflict may be carefully articulated and concrete steps may be outlined to ensure adequate prevention, investigation and criminal and civil redress, including compensation of victims.

IX. CONCLUSIONS

110. As Ms. Machel noted in her final report, "While abuses such as murder and torture have long been denounced as war crimes, rape has been downplayed as an unfortunate but inevitable side effect of war" (A/51/306, para. 91). However, a new attitude is evolving with respect to the prosecution of sexual violence committed during armed conflict as serious international crimes. The international community has increased its efforts to end the cycle of impunity for these crimes by ensuring, for both victims and perpetrators, that justice is done. The International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, as well as the proposed permanent International Criminal Court, are welcome advances in this campaign for justice, and it is hoped that these tribunals will endeavour to implement the best practices possible in this regard.

111. The international legal framework of humanitarian law, human rights law and criminal law which currently exists to prosecute crimes of sexual violence committed during armed conflict, although not always sufficiently explicit, clearly prohibits and criminalizes sexual violence and sexual slavery and provides universal jurisdiction in most cases. International law must better reflect the experience of women and the true nature of the harms done to them, particularly during armed conflict situations, and the further development of the legal framework through consistent, gender-responsive practice is a critical goal. Nevertheless, it is the lack of political will that poses the greatest obstacle to the effective prosecution and redress of sexual slavery and sexual violence during armed conflict.

112. When the necessary elements exist to establish that sexual violence constitutes an international crime such as slavery, crimes against humanity, genocide, torture or war crimes, it must be charged, prosecuted and redressed as such. Concrete steps must be taken immediately, including in those countries currently experiencing internal armed conflict or violence, to ensure that (a) sexual violence and sexual slavery are identified and documented; (b) legal frameworks are applied to ensure that the perpetrators of such abuses are brought to justice; and (c) victims of such abuses receive full redress under both criminal and civil laws, including compensation where appropriate. The international crime of slavery, including sexual slavery, is a particularly important and useful basis for addressing egregious acts of violence committed against women in armed conflict, given that its prohibition is a *jus cogens* norm which gives rise to pure universal jurisdiction.

113. Individual perpetrators of slavery, crimes against humanity, genocide, torture and war crimes - whether State or non-State actors - must be held responsible for their crimes at the international or national level, depending on the circumstances of the case and on the capacity and availability of forums to adjudicate the case fairly and dispense justice adequately. A strict application of the international legal standards for command responsibility, which apply to all authorities within a given chain of command, may prevent future sexual or gender violence in conflict situations and will serve the goals of protection, enforcement and deterrence. In many cases, it may be more efficient to focus resources on the prosecution of commanding officers at the international level for such crimes as crimes against humanity or genocide, or for the failure to take steps to prevent

sexual violence against and enslavement of girls and women, while prosecuting those responsible for carrying out the specific offences for appropriate international crimes in municipal proceedings. In addition, those who incite or solicit the commission of international crimes or contribute to their commission through acts in complicity, must also be held liable for their actions or inaction, as the case may be.

114. To the discredit of us all, the international community waited too long to become involved in the situations in the former Yugoslavia and Rwanda despite the reports of massive violations of life and liberty of men and women, including rape and other forms of sexual violence being used as war tactics. Widespread, frequent and unremedied acts of rape and other forms of sexual violence are important indicators of a nascent conflict and such alerts must be taken as seriously as reports of mass killings and forcible expulsions. The international community must respond quickly to these early warnings of armed conflict situations and humanitarian, diplomatic and preventative intervention must include efforts to address such sexual or gender-based violence.

115. Armed conflict exacerbates the discrimination and violence directed at women everywhere, every day. To end the cycle of violence, the equal rights of women to participate in the economic, social, political and cultural life of their societies must be protected and promoted. Without the full equality and participation of women, any steps taken to prevent systematic rape or sexual slavery during armed conflict or to rebuild societies recovering from war will ultimately fail.

Notes

1/ The Special Rapporteur would like to thank the following individuals for their assistance in producing this report: Stephen Bowen, Mark Bromley, Alice M. Miller and Alison N. Stewart. In addition, the Special Rapporteur would also like to thank the following individuals who provided expert guidance during the course of this study: Kelly Askin, M. Cherif Bassiouni, Diane Orentlicher, Patricia Viseur Sellers, and David Weissbrodt.

2/ For a discussion, see Hilary Charlesworth, Christine Chinkin and Shelley Wright, "Feminist approaches to international law", American Journal of International Law, vol. 85, 1991.

3/ Madeline Morris, "By force of arms: rape, war, and military culture", Duke Law Journal, vol. 45, 1996.

4/ "The term 'gender' refers to the socially constructed roles of women and men in public and private life. Gender is distinct from 'sex', which is biologically determined." Donna Sullivan, Integration of Women's Human Rights into the Work of the Special Rapporteurs (New York: UNIFEM, 1996).

5/ See Beijing Declaration and Platform for Action (A/CONF.177/20), paras. 131-149; Radhika Coomaraswamy, Report of the Special Rapporteur on violence against women, its causes and consequences (E/CN.4/1998/54), paras. 8-18.

6/ M. Cherif Bassiouni, Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia, Occasional Paper No. 1, International Human Rights Law Institute, DePaul University College of Law (1996), p. 3.

7/ Human Rights Watch, Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath, New York, (1996) p. 62.

8/ See International Criminal Tribunal for the Former Yugoslavia (ICTFY), Prosecutor v. Tadic, Case IT-94-1-T (Trial Chamber Judgment of 7 May 1997).

9/ ICTFY, Indictment of Miljkovic and Others, Case IT-95-9-I (21 July 1995) para. 31.

10/ Rape and Sexual Assault: A Legal Study. Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) (S/1994/674/Add.2 (Vol. I), annex II), para. 2.

11/ Ibid., note 4 (stating that "[v]iolent crimes of a homosexual nature are not explicitly mentioned in international humanitarian law... That international humanitarian law, insofar as it provides protection against rape and other sexual assaults, is applicable to men as well as women is beyond any doubt as the international human right not to be discriminated against (in this case on the basis of sex) does not allow derogation.").

12/ ICTFY, Rules of procedure and evidence, (as amended on 25 July 1997), rule 96 (Evidence in cases of Sexual Assault); International Tribunal for Rwanda, Rules of procedure and evidence, entered into force 29 June 1995.

13/ Ibid.

14/ M. Cherif Bassiouni, "Enslavement as an International Crime", New York University Journal of International Law and Politics vol. 23 (1991) p. 458.

15/ For example, see ICTFY, Indictment of Gagovic and Others, case IT-96-23-I (26 June 1996) [hereinafter Foca Indictment].

16/ See for example, Betsy Apple, School for Rape: The Burmese Military and Sexual Violence (1998), p. 49.

17/ Coomaraswamy, (E/CN.4/1998/54, para. 42). It is clear that many victims of sexual slavery and sexual violence during armed conflict are children. Ms. Graça Machel, the expert appointed by the Secretary-General to undertake a study on the impact of armed conflict on children, stated in her final report (A/51/306 of 26 August 1996, para. 45):

"In Guatemala, rebel groups use girls to prepare food, attend to the wounded and wash clothes. Girls may also be forced to provide sexual services. In Uganda, girls who are abducted by the Lord's Resistance Army are 'married off' to rebel leaders. If the man dies, the girl is put aside for ritual cleansing and then married off to another rebel."

18/ Machel, Ibid., para. 91. "While abuses such as murder and torture have long been denounced as war crimes, rape has been downplayed as an unfortunate but inevitable side effect of war."

19/ M. Cherif Bassiouni, International Crimes: *Jus Cogens* and Obligations *Erga Omnes*, in Bassiouni and Madeline H. Morris, (eds.), Accountability for International Crimes and Serious Violations of Fundamental Human Rights, 1996, p. 68.

20/ Ibid., pp. 65-66.

21/ Ibid.

22/ See ICTFY, Tadic case, sect. VI.D.2.ii.a. A Trial Chamber of the ICTFY noted that "it is now well established that the requirement that the acts be directed against a civilian 'population' can be fulfilled if the acts occur on either a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts".

23/ Article 6 (c) of the Charter of the International Military Tribunal, Nürnberg (1945) defines crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated". See also the Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1994) (S/1994/674), para. 83.

24/ ICTFY, Tadic case, Appeals Chamber Decision on Jurisdiction of 2 October 1995, para. 141 (stating that it was a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict).

25/ Theodor Meron, "Rape as a Crime under international humanitarian law", American Journal of International Law, vol. 87, 1993, p. 428.

26/ M. Cherif Bassiouni, Crimes against Humanity in International Criminal Law, (Dordrecht, Boston: M. Nijhoff, 1992) p. 251. The author states:

"[I]t is inconceivable that any targeted group, no matter what its affinity may be, should be excluded [from grounds of protection under crimes against humanity]. The element of discrimination evidences the collective nature of the crime and its scope should have no limits and no quantitative or numerical standards for the

persons to be included in the discriminated group."

27/ Ibid. See also Commission of Experts Report (S/1994/674), para. 107.

28/ Charter of the International Military Tribunal, Nürnberg, art. 6 (c); Charter of the International Military Tribunal for the Far East, art. 5 (c); Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes against Peace and against Humanity, art. 1 (c).

29/ Security Council resolution 827 (1993), annex.

30/ Security Council resolution 955 (1994), annex.

31/ Foca Indictment, supra note 15, Counts 56, 57, 61 and 62, paras. 12.2, 12.5.

32/ Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain), Judgement of 5 February 1970: I.C.J. Reports 1970, p. 32.

33/ John P. Humphrey, The International Law of Human Rights in the Middle Twentieth Century, reprinted in Richard B. Lillich, International Human Rights: Problems of Law, Policy, and Practice (2nd ed.) (Boston, Toronto: Little Brown & Co., 1991), p. 1.

> "By 1885, it was possible to affirm, in the General Act of the Berlin Conference on Central Africa, that 'trading in slaves is forbidden in conformity with the principles of international law'. And in 1889, the Brussels Conference not only condemned slavery and the slave trade but agreed on measures for their suppression, including the granting of reciprocal rights of search, and the capture and trial of slave ships. This work was continued by both the League of Nations and the United Nations."

34/ Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951, p. 15.

35/ Commission of Experts Report (S/1994/674), para. 313.

36/ Yoram Dinstein, "International Criminal Law", Israel Yearbook on Human Rights, vol. 5, 1975, reprinted in Henry J. Steiner and Philip Alston, International Human Rights in Context, Law, Politics, Morals (Oxford: Clarendon Press, 1996), pp. 1025, 1028 (noting that "the murder of a single individual may be categorized as genocide if it constitutes a part of a series of acts designed to attain the destruction of the group to which the victim belonged").

37/ Report of the Special Rapporteur on the question of torture to the Commission on Human Rights at its forty-second session (E/CN.4/1985/15, para. 119); International Human Rights Law Group, Token Gestures: Women's Human Rights and UN Reporting, 1993, pp. 6-11.

38/ Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (eleventh session, 1992), para. 6.

39/ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Judgment of 27 June 1986, I.C.J. Reports 1986, p. 114 (finding that the rules articulated in article 3 common to the Geneva Conventions, as declarative of customary international law, represent elementary considerations of humanity).

40/ Report of the International Law Commission on the work of its thirty-second session, Official Records of the General Assembly, Thirty-fifth Session, Suplement No. 10 (A/32/10) (1980).

41/ Article 49 of the (First) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; article 146 of the (Fourth) Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

42/ In general, the grave breaches provisions of the Geneva Convention of 1949 are intended to benefit "protected persons" which article 4 of the Fourth Geneva Convention defines as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals". The grave breaches provisions are also intended to apply during international armed conflicts involving one or more Contracting Parties to the Conventions. Article 3 common to the Conventions and Protocol II additional to the Conventions offer more limited protections in conflicts of a non-international character.

The Appeals Chamber of the ICTFY has ruled (in the *Tadic* case) that even as customary international law, the grave breaches provisions of the Geneva Conventions apply only in the context of international armed conflicts. However, commentators have criticized this decision as being under-inclusive. Theodor Meron, "The continuing role of custom in the formation of international humanitarian law", American Journal of International Law, vol. 90, p. 243.

43/ A single act of rape is sufficient to constitute a war crime. Commission of Experts Report (S/1994/674), para. 105 and Rape and Sexual Assault (S/1994/674/Add.2) (vol. I), annex II, para. 16.

44/ International Committee of the Red Cross, Aide-Mémoire, 3 December 1992. See also Meron, supra note 25, p. 26.

45/ Ibid. See also Amnesty International, Bosnia and Herzegovina: Rape and Sexual Abuses by Armed Forces, 1993.

46/ The Regulations annexed to the Hague Convention No. IV of 1907 should be viewed as having attained the status of customary international law by at least 1939. Judgement of the Nürnberg Tribunal, in American Journal of International Law, vol. 41, 1947.

47/ Ibid.

48/ U. Dolgopol and S. Paranjape, Comfort Women: An Unfinished Ordeal, International Commission of Jurists, 1993, pp. 135-36.

49/ Most Nürnberg Tribunal slave labour cases alleged violations of article 46 of the Hague Convention Regulations concerning family honour, coupled with article 52 concerning the types of forced labour that may be required of civilian populations. See also Bassiouni, supra note 14.

50/ Significantly, articles 27 and 147 of the Fourth Geneva Convention directly address certain aspects of slavery or slavery-like practices. Slavery and related crimes are addressed in articles 49-57 of the (Third) Geneva Convention Relative to the Treatment of Prisoners of War, which specifically regulate the labour of prisoners of war, particularly labour which is of an unhealthy, dangerous or humiliating nature. In addition, article 130 of the Third Geneva Convention considers "wilful killing, torture or inhuman treatment, including biological experiments, [and] wilfully causing great suffering or serious injury to body or health" to be grave breaches. When read in conjunction with article 130, the prohibitions in articles 49-57 of the Third Geneva Convention include various forms of slavery as grave breaches. Bassiouni, supra note 14, pp. 510-512.

51/ Jean S. Pictet, et al. (eds.), Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva: International Committee of the Red Cross, 1958) p. 598 (commentary on art. 147); Meron, supra note 25; Anne Tierney Goldstein, Recognizing Forced Impregnation as a War Crime Under International Law, 1993, pp. 9-11.

52/ Foca Indictment, supra note 31.

53/ Ibid., para. 10.2.

54/ The present report recognized the current efforts to identify and rectify any limits that do exist to the application of existing norms to situations of internal violence. The analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21 endeavours to establish a framework for minimum humanitarian standards and groups the limitations and failings of human rights law under three broad categories: (1) concern for derogations; (2) questions concerning the accountability of armed groups under the human rights standards; and (3) the lack of specificity in human rights standards that prevent their effective application in situations of international violence (E/CN.4/1998/87, para. 40).

55/ ICFTY, *Tadic* case, Appeals Chamber decision, paras. 84, 89.

56/ Nicaragua v. United States, supra note 39, p. 14.

57/ See also article 4 (2) (e) of Additional Protocol II (prohibiting "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault").

58/ Theodor Meron, Human Rights in Internal Strife: Their International Protection (Cambridge, Grotius Publ., 1987), pp. 44-50.

59/ Pictet, supra note 51, p. 36.

60/ Ibid. (noting that the scope of application of article 3 "must be as wide as possible" as article 3 "merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the municipal law of the States in question, long before the Convention was signed.").

61/ ICTFY Statute, art. 7; ITR Statute, art. 6.

62/ Commission of Experts Report (S/1994/674), para. 55.

63/ Ibid., para. 313.

64/ ICTFY, Miljkovic Indictment, paras. 31, 33, 34.

65/ Ibid.

66/ Human Rights Watch, supra note 7, pp. 15-19; Jamie Frederic Metzl, Rwandan genocide and the international law of radio jamming", American Journal of International Law, vol. 91, pp. 628-634, 650.

67/ Ibid., p. 18; Human Rights Watch, War Crimes in Bosnia-Herzegovina, vol. II (1993), pp. 166-167.

68/ Metzl, supra note 66, p. 636 (citing Trial of the Major War Criminals Before the International Military Tribunal, Nürnberg, 1947, p. 548.

69/ Edith Coron, "Papon verdict condemns a collaborator and an era", The European, 6 April 1998.

70/ For example, the French courts in 1987 upheld the conviction of Nazi war criminal Klaus Barbie for crimes against humanity. International Law Review, vol. 78, 1988.

71/ Ian Brownlie, Principles of Public International Law, 4th ed. (Oxford: Clarendon Press, 1990), p. 485.

Appendix

AN ANALYSIS OF THE LEGAL LIABILITY OF THE GOVERNMENT OF JAPAN FOR "COMFORT WOMEN STATIONS" ESTABLISHED DURING THE SECOND WORLD WAR

Introduction

1. Between 1932 and the end of the Second World War, the Japanese Government and the Japanese Imperial Army forced over 200,000 women into sexual slavery in rape centres throughout Asia. These rape centres have often been referred to in objectionably euphemistic terms as "comfort stations". The majority of these "comfort women" 1/ were from Korea, but many were also taken from China, Indonesia, the Philippines and other Asian countries under Japanese control. Over the past decade, an increasing number of women survivors of these atrocities have come forward to seek redress for these crimes. The present appendix relies exclusively on the facts established in the Japanese Government's own review of the involvement of Japanese military officials in establishing, supervising and maintaining rape centres during the Second World War. Based on these admissions by the Japanese Government, the appendix then seeks to evaluate the Japanese Government's current legal liability for the enslavement and rape of women in "comfort stations" during the Second World War. Although numerous grounds for liability may exist, this report focuses specifically on liability for the most egregious international crimes of slavery, crimes against humanity and war crimes. The appendix also sets out the legal framework under international criminal law and examines claims that may be brought by survivors for compensation.

I. THE POSITION OF THE GOVERNMENT OF JAPAN

2. After denying for many years the extent to which the Japanese military was directly involved in establishing and supervising rape centres during the Second World War, the Japanese Government finally recognized the extent of its own involvement in the establishment of the "comfort stations" in an official study entitled "On the issue of wartime 'comfort women' of 4 August 1993 by the Japanese Cabinet Councillors' Office on External Affairs and in a statement by the Chief Cabinet Secretary on the same date (E/CN.4/1996/137, annex I)". The study included a review of wartime archives and interviews with both military personnel and former "comfort women". As discussed in the present appendix, the 1993 study highlights the "comfort women's" lack of personal and sexual autonomy and the regulation of the health of the women as if they were chattel.

3. The Japanese Government has recently offered a number of public apologies for the "problem" of the "comfort women." Most notably, in July 1995, on the occasion of the fiftieth anniversary of the end of the Second World War, Japanese Prime Minister Tomiichi Murayama noted that "the scars of war still run deep" and that the "problem of the so-called 'wartime comfort women' is one such scar, which, with the involvement of the Japanese military forces of the time, seriously stained the honour and dignity of many women. This is entirely inexcusable. I offer my profound apology to all those who, as wartime comfort women, suffered emotional and physical wounds that can never be closed." 2/

4. Despite these apologies and admissions, the Japanese Government continues to deny legal liability for the Japanese military's actions with respect to the "establishment and management" of the comfort stations (see E/CN.4/1996/137). In particular, in responding to a report by the Special Rapporteur of the Commission on violence against women, Ms. Radhika Coomaraswamy (E/CN.4/1996/53/Add.1), the Japanese Government has forcefully denied legal liability on a number of substantive grounds, the most significant of which include: (a) that recent developments or advances in international criminal law may not be applied retroactively; (b) that the crime of slavery does not accurately describe the system established through the "comfort stations" and that the prohibition against slavery was not, in any event, established as a customary norm under applicable international law at the time of the Second World War; (c) that acts of rape in armed conflict were not prohibited by either the Regulations annexed to the Hague Convention No. IV of 1907 or by applicable customary norms of international law in force at the time of the Second World War; and (d) that the laws of war would only apply, in any event, to conduct committed by the Japanese military against nationals of a belligerent State and would not, therefore, cover the actions of the Japanese military with respect to Japanese or Korean nationals, since Korea was annexed to Japan during the Second World War (ibid.).

5. Following the Government of Japan's apologies for the Japanese military's direct involvement in the "comfort stations", the Japanese Government established in July 1995 the Asian Women's Fund "to protect women's human rights in Japan and the world." 3/ The Asian Women's Fund supports women's non-governmental organizations (NGOs) "which take steps to alleviate problems women face today"; provides counselling services for women; supports research and academic study; holds meetings and conferences to address issues affecting women; and, with respect to the "comfort women", promotes "the desire to convey to these women the sincere apologies and remorse felt by the Japanese people" through "atonement" funds that are raised directly from donations made by the Japanese public. 4/

6. With respect to claims for legal compensation, the Japanese Government argues that individual "comfort women" have no right to such compensation. Alternatively, the Government of Japan also argues that any individual claims that these women may have had for compensation were fully satisfied by peace treaties and international agreements between Japan and other Asian States following the end of the Second World War. Finally, the Government of Japan additionally claims that any civil or criminal cases concerning the Second World War rape centres would now be time-barred by applicable statute of limitations provisions (see E/CN.4/1996/137).

II. THE NATURE AND EXTENT OF THE RAPE CENTRES

7. It is now clear that both the Japanese Government and military were directly involved in the establishment of rape centres throughout Asia during the Second World War. The women who were enslaved by the Japanese military in these centres - many of whom were between the ages of 11 and 20 - were housed in locations throughout Japanese-controlled Asia, where they were forcibly raped multiple times on a daily basis and subjected to severe physical abuse and exposed to sexually transmitted diseases. 5/ Only about 25 per cent of

these women are said to have survived these daily abuses. 6/ To obtain these "comfort women", the Japanese military employed physical violence, kidnapping, coercion and deception. 7/

8. Preliminary investigations by governmental and non-governmental organizations have revealed three categories of "comfort stations": (1) those under the direct management and control of the Japanese military; (2) those formally under the management of private traders but effectively under the control of the military and used exclusively by the military and its civilian employees; and (3) those run by private entities in which the military was given priority but which were also available for Japanese citizens. 8/ The second category of "comfort stations" is believed to have been the most common. 9/ Although the Japanese Government has acknowledged "moral responsibility" for the Japanese military's involvement in these actions, Japan consistently has denied all legal responsibility. 10/

9. The Japanese Government's own report highlights the following relevant facts:

(a) **Reasons for establishing the comfort stations.** "The comfort stations were established in various locations in response to the request of the military authorities at the time. Internal government documents from those days cite as reasons for establishing comfort stations the need to prevent anti-Japanese sentiments from fermenting [sic] as a result of rapes and other unlawful acts by Japanese military personnel against local residents in the areas occupied by the then Japanese military, the need to prevent loss of troop strength by venereal and other diseases, and the need to prevent espionage" (E/CN.4/1996/137, p. 14);

(b) **Time period and location.** "As some documents indicate that a comfort station was established in Shanghai at the time of the so-called Shanghai Incident in 1932 for the troops stationed there, it is assumed that comfort stations were in existence since around that time to the end of the Second World War. The facilities expanded in scale and in geographical scope later on as the war spread" (ibid., pp. 14-15);

(c) **Military control over private operators.** "Many comfort stations were run by private operators, although in some areas there were cases in which the then military directly operated comfort stations. Even in those cases where the facilities were run by private operators, the then Japanese military was involved directly in the establishment and management of the comfort stations by such means as granting permission to open the facilities, equipping the facilities, drawing up the regulations for the comfort stations that set the hours of operation and tariff and stipulated such matters as precautions for the use of the facilities" (ibid., p. 16);

(d) **Military supervision of health conditions.** "With regard to the supervision of the comfort women, the then Japanese military imposed such measures as mandatory use of contraceptives as a part of the comfort station regulations and regular check-ups of comfort women for venereal and other diseases by military doctors, for the purpose of hygienic control of the comfort women and the comfort stations" (ibid.);

(e) Restrictions on freedom of movement. "Some stations controlled the comfort women by restricting their leave time as well as the destinations they could go to during the leave time under the comfort station regulations. It is evident, at any rate, that, in the war areas, these women were forced to move with the military under constant military control and that they were deprived of their freedom and had to endure misery" (ibid.);

(f) Recruitment. "In many cases private recruiters, asked by the comfort station operators who represented the request of the military authorities, conducted the recruitment of the comfort women. Pressed by the growing need for more comfort women stemming from the spread of the war, these recruiters resorted in many cases to coaxing and intimidating these women to be recruited against their own will, and there were even cases where administrative/military personnel directly took part in the recruitment" (ibid., p. 17);

(g) Transportation. "In quite a few cases the women were transported to the war areas by military ships and vehicles, and in some cases they were left behind in the confusion of the rout that ensued Japanese defeat" (ibid.).

10. These facts, as stipulated by the Japanese Government, clearly demonstrate that contrary to repeated claims that the so-called "comfort women" "worked" in privately administered brothels, the women, many of whom were still children at the time, were in fact enslaved in rape centres either directly by the Japanese military or with the full knowledge and support of the Japanese military. The women and children who were held there against their will inside these "comfort stations" were then subjected to acts of rape and sexual violence on such a massive scale that the nature of the crime may only properly be described as a crime against humanity.

III. PREVAILING NORMS OF SUBSTANTIVE CUSTOMARY INTERNATIONAL LAW

11. This appendix considers customary international law norms that may be applied to the enslavement of "comfort women" by the Japanese Government and the Japanese Imperial Army during the Second World War, focusing in particular on customary international norms prohibiting slavery, rape as a war crime and crimes against humanity.

A. Slavery and the slave trade

12. Unquestionably, slavery and the slave trade were prohibited well before the "comfort stations" were created. The Nürnberg prosecutions following the Second World War merely "made explicit and unambiguous what was theretofore ... implicit in international law, namely that ... to exterminate, enslave or deport civilian populations, is an international crime." 11/ Indeed, the prohibition against slavery in particular has clearly attained *jus cogens* status. 12/ Accordingly, the Japanese military's enslavement of women throughout Asia during the Second World War was a clear violation, even at that time, of customary international law prohibiting slavery.

13. By the beginning of the nineteenth century, many countries already had banned the importation of slaves. 13/ This prohibition was accompanied by the development of multiple international agreements through which countries

sought to end slavery and the slave trade. 14/ An international arbitration case as early as 1855 stated that the slave trade was "prohibited by all civilized nations and contrary to the law of nations". 15/ By 1900, slavery in its basic form was almost entirely eradicated in most countries. 16/ Notably, Japan appears to have declared as early as 1872, in a case in which it convicted Peruvian traders of the crime of slavery, that Japan had in fact prohibited the slave trade throughout its history. 17/

14. By 1932, at least 20 international agreements suppressing the slave trade, slavery or slavery-related practices had been concluded. 18/ Moreover, of a representative sample of States in 1944, virtually all prohibited slavery under their national laws, including Japan. 19/ Due to the prevalence of the international condemnation of slavery before the Second World War, the 1926 Slavery Convention, which was developed by the League of Nations and provided a definition of slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised", was clearly declaratory of customary international law by at least the time of the Second World War. 20/

15. The customary nature of the prohibition on slavery is equally evident in the body of law governing the treatment of civilians under the rules of war. One of the most basic international instruments on the laws of war to be adopted in this century, the Hague Convention No. 4 of 1907, incorporates important protections for civilians and belligerents from enslavement and forced labour. The Nürnberg judgement against Nazi war criminals following the Second World War confirmed, moreover, that the 1907 Hague Convention was clearly declaratory of customary international law by the Second World War. 21/

16. Pursuant to article 6 (c) of the Nürnberg Tribunal's official Charter, the Allied Powers convicted a number of war criminals on charges of "war crimes". In particular, war crimes in the Nürnberg Charter included "ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory". Article 5 (c) of the Charter of the International Military Tribunal for the Far East included similar language. It is important to recognize, once again, that the prosecutions of Japanese and German war criminals based on these codifications of international law were expressly based on pre-existing standards, 22/ including those standards which clearly prohibited slavery prior to the Second World War. 23/

B. Rape as a war crime

17. As with slavery, the laws of war also prohibited rape and forced prostitution. Several early authoritative sources on the rules of war - most prominently, the 1863 Lieber Code - explicitly prohibited rape or the mistreatment of women during war. 24/ Moreover, a number of persons were prosecuted following the Second World War based in part on charges of forced prostitution and rape, further establishing that such conduct was unlawful. 25/ The Hague Convention Regulations of 1907 further provided that "[f]amily honour and rights ... must be respected". 26/ Indeed, article 27 of the Fourth Geneva Convention, which is considered declaratory of customary international law and incorporates the Hague Convention's earlier "family

honour" language, 27/ makes explicit that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault". Although the characterization of rape as a crime against women's honour, rather than a crime of violence, is unfortunate and incorrect, it is well established that rape and forced prostitution were prohibited under customary international law by at least the time the first "comfort stations" were established. 28/

C. Crimes against humanity

18. The widespread or systematic enslavement of persons has also been recognized as a crime against humanity for at least half a century. This is particularly true when such crimes have been committed during an armed conflict, even though a nexus to armed conflict is no longer considered a necessary element of crimes against humanity.

19. Article 6 (c) of the Nürnberg Charter and Control Council Law No. 10, which was established to facilitate additional national prosecutions of war criminals in Germany following the Second World War, listed "enslavement, deportation and other inhumane acts committed against any civilian population" as crimes against humanity. Similarly, article 5 of the Charter of the International Military Tribunal for the Far East in Tokyo also listed enslavement, deportation to slave labour and other inhumane acts as crimes against humanity.

20. In addition to enslavement, widespread or systematic acts of rape also fall within the general prohibition of "inhumane acts" in the traditional formulation of crimes against humanity that is contained in the Nürnberg Charter and the Charter of the International Military Tribunal for the Far East in Tokyo. 29/ In more recent codifications of crimes against humanity, rather than relying on the residual provision of "other inhumane acts", rape has been explicitly listed as a crime against humanity when committed in the course of either an internal or international armed conflict and directed against any civilian population. Such recent codifications of crimes against humanity include article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia and article 3 of the International Tribunal for Rwanda, both of which explicitly list enslavement and rape as constituent acts of crimes against humanity.

21. Proof of planning, policy or design is generally considered a necessary element in a prosecution of crimes against humanity, 30/ however, the failure to take action in the face of widespread violations can be sufficient to establish this requisite element. 31/ In addition, both military personnel and civilians occupying certain positions may be held accountable for crimes against humanity.

IV. APPLICATION OF SUBSTANTIVE LAW

22. The treatment of the "comfort women" falls within the ordinary usage of "slavery" and the "slave trade" and meets the 1926 Slavery Convention definition of slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". According to the Japanese Government's own admissions, as noted above, the

women were "deprived of their freedom" and "recruited against their own will". Moreover, some women were purchased and therefore easily fit the classic mould of slavery. The exchange of money, however, is not the only or even the most significant indicia of slavery. To the extent that any or all of the "comfort women" experienced a significant loss of autonomy, thereby rendering their treatment by the Japanese military as anything akin to the treatment of chattel, criminal liability for enslavement would clearly attach for both the perpetrators of the criminal acts described and their superior officers. Once again, in the particular case of the "comfort women", the Japanese Government's own studies have highlighted the extent to which the women were deprived of personal freedom, moved along with military troops and equipment into and out of war zones, denied control over their sexual autonomy and subjected to hideous regulation on a chattel-like basis of their reproductive health in an effort to protect the military troops from sexually transmitted diseases.

23. In those limited cases that the Japanese Government may claim technically fall outside of the definition of slavery, the "comfort women" were still clearly raped and held in war zones under conditions that, at the very least, did not comply with permissible forms of "forced labour". 32/ With respect to forced prostitution and rape, the Japanese Government has admitted that its actions severely injured the honour and dignity of many women. Although not acknowledged explicitly, it is clear that the harm to which the women were subject included rape and forcible sexual conduct on a regular basis. These actions therefore easily qualify as rape and forced prostitution in violation of the laws of war.

24. Due to the massive scale on which these crimes were committed and to the Japanese military's clear involvement in the establishment, maintenance and regulation of these rape centres, Japanese military officials who were involved or responsible for the "comfort stations" may similarly be held responsible for crimes against humanity. As a result, the Japanese Government itself also has a continuing obligation to provide compensation for the harms that these women and girls suffered due to the actions of the Japanese military.

V. DEFENCES OF THE JAPANESE GOVERNMENT

A. Retroactive application of the law

25. At the time of the Nürnberg trials, the defendants and some commentators protested that prosecutions for crimes against humanity violated the principle of legality (*nullum crimen sine lege*) because the crimes were newly defined in the Tribunal's Charter and the defendants' actions therefore did not violate international law at the time that they were committed. 33/ Japan has made a similar argument regarding the allegation by the former "comfort women" that Japan acted in violation of customary international law in enslaving and raping "comfort women" across Asia. 34/

26. As discussed above, the Japanese Government's claims that the actions of the Japanese military during the Second World War were not prohibited during the time period in which the offences were committed because the international crimes of rape and enslavement were not clearly prohibited as customary norms

during the Second World War are easily refuted. Similar arguments were unpersuasive 50 years ago when they were first raised at the Nürnberg trials and, for the reasons stated above, they remain unpersuasive today.

B. Prohibition of slavery

27. Customary international prohibitions against slavery were clearly established by the time of the Second World War and were included in the Tokyo and Nürnberg Charters that codified customary international law in preparation for criminal trials following the end of the Second World War. As customary international law, prohibitions against slavery may be applied under the laws of war or independently as substantive violations irrespective of the nature or even the existence of an armed conflict.

C. Rape and forced prostitution

28. The Japanese Government has attempted to refute the construction of the "family honour" language in the Hague Convention No. IV of 1907 as protecting the "comfort women" by arguing that the Convention "only laid down general principles which may be accepted by signatories to the convention as internal law in such forms as instruction to the armed labour force". 35/ The Japanese Government claims, in essence, that acts of rape were not explicitly prohibited by the Hague Convention or the laws of war during the Second World War. As discussed above, this interpretation is belied by the acceptance of the Hague Convention as customary international law governing the laws of war and by other law of war sources that confirm the international prohibition on the rape of civilians during armed conflicts. As a result, the prohibitions against rape contained in the "family honour" language represented a binding rule of international law during the Second World War.

D. Status of Korea

29. Japan also has sought to deny liability on the ground that Korean women were not protected by customary international law norms prohibiting enslavement and rape because such norms are based on the law of war, which protects only civilians in occupied territories and not civilians in their home countries. Since Korea was annexed to Japan during the time period in question, this argument contends that such norms were inapplicable to the Korean women.

30. Japan is not exempt from liability even under these circumstances. As set forth above, prohibitions concerning slavery are not based solely on war crimes. Both as a customary international crime applicable in wartime and peacetime and as a crime against humanity, these acts were clearly prohibited as egregious violations of customary international law regardless of the territorial status of the Korean peninsula at the time that the offences were committed. As a result, these norms apply equally to Korean women, whether or not they were civilians in an occupied territory.

VI. REDRESS

31. Under customary international law, the Government of Japan must provide redress for the atrocities perpetrated against the "comfort women". Redress should take the form of individual compensation to the former "comfort women" by the Government of Japan. Alternatively, compensation could also be sought by States on behalf of their citizens who were former "comfort women". These States must then establish mechanisms to distribute those funds to the aggrieved victims. In addition, as indicated above, government and military personnel must also be prosecuted for their culpability in establishing and maintaining the rape centres.

A. Individual criminal liability

32. Individual Japanese military officers and soldiers who committed unlawful acts must be held individually liable for the harm they caused. To the extent that sufficient evidence may be established, given the five decades that have passed, these individuals can and must be brought to justice.

33. Precedent for such prosecutions is long-standing. In 1946, the Temporary Court Martial Tribunal in Batavia, Indonesia, conducted by the Government of the Netherlands, found nine Japanese soldiers guilty of abducting girls and women for purposes of forced prostitution and rape. 36/ Similarly, the Philippine Tribunal found a Japanese officer guilty of rape and sentenced him to life imprisonment. 37/ Applying customary international law, the Nürnberg and Tokyo Tribunals also found individual military officers, their commanding officers, and the German and Japanese Governments responsible for committing war crimes and crimes against humanity. In 1946 the United Nations General Assembly reaffirmed, in resolution 95 (I) of 11 December 1946, that the principles of international law set forth in the Charter of the International Military Tribunal and the Charter of the International Military Tribunal for the Far East were customary international law recognized by United Nations Members generally.

34. Article 11 of the Treaty of San Francisco provides, moreover, that Japan must accept the judgements of the International Military Tribunal for the Far East (IMTFE) and other Allied War Crimes Tribunals both within and outside Japan. In addition, although the Nürnberg Charter used new terminology in referring to "crimes against humanity" it did not actually create new law or make illegal behaviour that was previously permissible under customary international law. According to Oppenheim:

> "the entire law of war is based on the assumption that its commands are binding not only upon States but also upon their nationals, whether members of their armed forces or not. To that extent no innovation was implied in the Charter annexed to the Agreement of 8 August 1945, for the punishment of the Major War Criminals of the European Axis inasmuch as it decreed individual responsibility for war crimes proper and for what it described as crimes against humanity ..." 38/

Under these precedents, individual officers clearly can and should be punished for their crimes.

35. In addition to the liability of each individual soldier, military and governmental officers also are liable for the establishment and maintenance of the "comfort stations" by those soldiers and officers under their command. The command responsibility doctrine provides that superior officers will be held responsible for the illegal acts committed by their subordinates: (a) if the superiors knew or had reason to know that such acts were about to be committed and initiated no preventive action; or (b) if the acts were committed and superiors took no measures to prevent their repetition. 39/ The doctrine was first used as the basis for an international prosecution during the United States military commission trial that resulted in the conviction of Japanese general Tomoyuki Yamashita for the killing of tens of thousands of Filipino and American prisoners of war. The principles underlying the doctrine had, however, emerged at least as early as the Second World War, when recommendations were made at Versailles that Germany's Kaiser be tried as a war criminal because he and the commanding officers under him "could at least have mitigated the barbarities committed during the course of the war" by their subordinates. 40/ Commentators have traced the foundations of the command responsibility as far back as fifteenth century France 41/ and the Roman Empire in 19 B.C. 42/ The principle was most clearly articulated in several of the Nürnberg trials and in the post-war trial of United States Colonel Medina for the 1969 My Lai massacre in Viet Nam - prosecutions, it should be noted, that applied pre-existing customary norms.

36. The widespread and systematic involvement of the Japanese military in the establishment and operation of the "comfort stations" ensures that senior officers of the Japanese military must have had actual or constructive knowledge of the existence of the "comfort stations". It is also important to note that mid-level Japanese military officials who were involved in or responsible for the "comfort stations" may not escape criminal liability by asserting a "superior orders" defence, as such a claim may only be considered in mitigation of any punishment that is actually imposed. 43/

37. Japan is clearly the most appropriate location to conduct criminal prosecutions of those responsible for implementing the "comfort station" system. The Korean Council for the Women Drafted for Sexual Slavery by Japan filed a complaint in 1994 with the Chief Prosecutor in Tokyo seeking criminal prosecution of Japanese military officers and others involved in the operation of the "comfort stations". 44/ The Japanese Government should act as a matter of urgency on this complaint and should seek to bring charges against any surviving individuals who operated or frequented the military's rape centres.

38. Other national courts may also be available to hear criminal proceedings, particularly since the principle of universal jurisdiction in cases involving slavery, crimes against humanity and war crimes properly permits any nation capturing the perpetrators of such universally condemned crimes to prosecute the offences. 45/ Nonetheless, while international law permits the exercise of universal jurisdiction, enabling national legislation is necessary for suits to actually move forward. 46/ In Canada, for example, this legislative basis is section 7 (3.71) of the Criminal Code, which provides that anyone who has committed a crime against humanity or a war crime outside Canada can be tried as if the crime had been committed in Canada. 47/ In the first prosecution ever attempted under this provision, the accused was a former member of the gendarmerie in Hungary who had assisted in the forced

confinement of Jews under Nazi command. 48/ Other jurisdictions should take all steps necessary to prosecute those Japanese military and government officials who were involved in or responsible for the "comfort stations" in their domestic courts, including, but not limited to, the enforcement of domestic laws granting jurisdiction for such offences and the provision of legal assistance and interpreters to the victims.

39. Criminal charges that may be brought against individual officers or command officials at this point in time would not be time-barred. Crimes against humanity and war crimes are not subject to any statute of limitations. They may not be extinguished by the passage of time. Indeed, in 1953, a United Nations report on international jurisdiction over crimes (A/2645) stated that a concept of a statute of limitations does not exist in present international law. 49/ In the Barbie prosecution, the French Court of Cassation similarly held that customary international law did not recognize a statute of limitations for crimes against humanity. 50/ Additionally, treaty law confirms that the international community will not bar claims for egregious violations of international law, such as war crimes or crimes against humanity, under statute of limitations concerns.

40. Even if a statute of limitations could conceivably be invoked, it is not applicable in this situation where new material facts have come to light recently. The first official hearings on the "comfort stations" were not held by Japan until 1992, and it was not until 1993 that the Japanese Government recognized the Japanese military's role in establishing and administering the "comfort stations". In light of the exceptional circumstances that prevented the "comfort women" from adequately pursuing their claims and the failure of the Japanese Government to adequately address the role that the Japanese military played in establishing and maintaining these rape centres, the interests of justice require that any applicable statute of limitations would begin to run no earlier than the date of the 1992 admissions by the Japanese Government.

B. State responsibility and liability to pay compensation

41. Prior to the Second World War, it was clear that a Government and its officials could be held liable for violations of international law under a theory of "original liability" for acts performed by a Government and "actions of the lower agents or private individuals as are performed at the Government's command or with its authorization". 51/ A State that is originally liable for a violation of international law has committed an act of "international delinquency". An "international delinquency" consists of "any injury to another State committed by the Head or Government of a State in violation of an international legal duty. Equivalent to acts of the Head and Government are acts of officials or other individuals commanded or authorized by the Head or Government". 52/ The responsible State is then liable "to pay compensation for injurious acts of its officials which, although unauthorized, fall within the normal scope of their duties". 53/ Therefore, a State was considered liable for commission of an injury to an individual alien within its territory if an agent of the State caused wrongful injury to that individual. Thus, Japan is liable for the actions of its military and any of its agents, including the private individuals who ran and profited from "comfort stations" at the request of the Japanese military. 54/

42. The Japanese Government is also liable for its failure to prevent the harm that was inflicted on the "comfort women". Under customary international law, States are liable for failing to act to prevent harm to aliens. Article 3 of the Hague Convention No. IV of 1907, which reflected customary international law by the Second World War, provided that a party to the 1907 Convention that violated the Convention's provisions was liable to pay compensation for the violation and "shall be responsible for all acts committed by persons forming part of its armed forces". This principle of responsibility and compensation has been described as an extension of the principle of *respondeat superior* to the law of nations, making States liable for the acts of their military forces. 55/ Pursuant to article 3 of the Hague Convention, each State has a duty to prevent, investigate, and punish gross human rights violations and violations of fundamental freedoms. The Japanese Government, therefore, is independently liable for failing to prevent harm to the "comfort women" and to punish the offenders. 56/

43. These legal rules date back at least to the 1920s. For example, in 1927 a General Claims Commission awarded damages to a widow in the Janes case to compensate for the Mexican Government's failure to apprehend and prosecute the person who murdered the woman's husband during the Revolution. 57/ The Commission stated that the Mexican Government was "liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender". 58/ In its decision, the Commission explicitly rejected the view that the failure of a State to punish wrongdoers should be deemed approval of the criminal conduct, thus making the Government complicit in the murder itself. Instead, the Commission held that a State's failure to prosecute and punish the offender against an alien was a separate offence by the State. Therefore, damages included both compensatory damages for Janes's death and additional damages to the family for the indignity of the lack of punishment. 59/

44. The Japanese Government has also argued that because conventional international law is deemed to regulate relationships between States, rather than relationships between individuals and States, no claim may be made against Japan by individual "comfort women". 60/ This argument, however, is clearly without merit since by the late 1920s international law recognized that when a State injured the nationals of another State, it inflicted injury upon that foreign State and was therefore liable for damages to make whole the injured individuals. Moreover, international law recognizes that individuals are also "subjects of rights conferred and duties imposed by international law.". 61/

1. Individual compensation

45. The "comfort women" have expressed their belief that the Government of Japan should provide: sincere and individual apologies; acknowledgment of the participation of the Japanese Government and army command; recognition of the nature and the extent of the violations of international law; and compensation for individual victims (see E/CN.4/1996/53/Add.2). As noted above, the Japanese Government's assertions that individuals are not subjects of international law are contradicted by several sources of international law, including: the Hague Convention No. IV of 1907; the Paris Peace Conference of 1919 (Treaty of Versailles); the Charter of the Tokyo War Crimes Tribunal; and

customary international law. These various legal documents and theories demonstrate the obligation of States to pay compensation for breaches of international law. In addition, as Theo van Boven noted in his study, a State's responsibility for breaches of international obligations implies a similar and corresponding right on the part of individuals to compensation for such breaches. The Treaty of Versailles, for example, provided that individuals could bring claims for damages against Germany.

46. In particular, a "prime purpose" of article 3 of the Hague Convention "was from the outset to provide individual persons with a right to claim compensation for damages they suffered as a result of acts in violation of the Regulations." 62/ Although this language is not expressed in article 3, "the drafting history of the article leaves no room for doubt that this was precisely its purpose." 63/ Notably, while the term "reparation" may take the form of restitution, indemnity, monetary compensation or satisfaction, 64/ "Article 3 specifically and solely utilizes the term 'compensation,'" 65/ which, by definition, means "payment of a sum of money to make good the damage ...". 66/ Thus, "[t]he use of this term instead of the more general 'reparation' may be seen as yet another indication that ... the drafters of the article had in mind the case of individual persons, victims of the laws of war, who wish to bring a claim for the injury or damage they suffered." 67/

47. In addition, the 1927 decision of the Permanent Court of International Justice (PCIJ) in the Chorzów Factory case held that if the situation prior to an act in violation of international law could not be restored (e.g. property returned), compensation must be paid. 68/ Since restoration of the victims of the "comfort stations" to their status prior to this violation is clearly impossible, compensation must be paid. Other PCIJ decisions similarly confirm the existence in international law of rights including compensation for private individuals. 69/ Indeed, Japan itself has acknowledged the possibility - if not the necessity - of individual compensation for breaches of international law. Agreements concluded by Japan with some of the Allied Powers specifically refer to individual redress, unlike those agreements concluded with Korea and the Philippines, which refer only to State claims for redress. 70/ For example, the Greece-Japan Agreement, the United Kingdom-Japan Agreement, and the Canada-Japan Agreement all contain provisions for compensation "for personal injury or death which arose before the existence of a state of war ... for which the Government of Japan [is] responsible according to international law." 71/ Particularly in light of the Government's prior admissions - implemented through numerous treaties - the Government's claim that individual compensation is not permissible as a remedy for governmental violations is simply not credible.

48. In short, the individual "comfort women" clearly have a right to adequate compensation for the harms they suffered at the hands of Japanese Government and military officials.

2. Civil suits for compensation

49. In the absence of appropriate action by the Japanese Government to meet their continuing legal obligations, surviving "comfort women" may be able to bring civil suits before judicial tribunals for compensation. Recourse may be available to tribunals in Japan and in other jurisdictions if Japanese courts

fail to grant adequate remedies. Given the nature and magnitude of the harms committed, these remedies should be pursued, notwithstanding the passage of time.

50. Clearly Japan is the most appropriate venue for the introduction of civil suits related to the "comfort women" tragedy. The recent court decision from the Shimonoseki branch of the Yamaguchi District Court in April 1998 concerning the Japanese Government's liability to the "comfort women" is a welcome indication that some of these women may ultimately receive legal redress through Japanese courts. 72/ In this recent case, a Japanese district court found that the Japanese Government had a duty to enact legislation to compensate the comfort women and that "by neglecting the comfort women for many years, the defendant country [Japan] exacerbated the pain and committed a new harm." 73/ The court noted, moreover, that:

> "[u]pon examination of facts presented in this case, the comfort women system was extremely sexist and racist, disgraced women, trampled on racial pride, and can be seen as a violation of fundamental human rights relating to the core values expressed in Section 13 of the Japanese National Constitution." 74/

51. The court decision ultimately held the Government of Japan liable and ordered payments to three women nationals of the Republic of Korea of 300,000 yen each (approximately US$ 2,300). 75/ Several other cases have also been filed in Japan by groups of Filipino, Korean, 76/ Dutch, 77/ and Chinese 78/ citizens, as well as Koreans living in Japan. 79/ The first case was filed in 1991, 80/ and at least six different groups of women had filed lawsuits as of July 1996. 81/

52. If remedies available within Japan prove inadequate, the "comfort women" may also seek redress in the courts of other countries that grant jurisdiction for such offences. In the United States, for example, the Alien Tort Claims Act (ATCA) grants jurisdiction to United States courts to hear civil actions for torts committed in violation of the law of nations or United States treaty law. This avenue should be vigorously pursued by the "comfort women" as a potential forum for redress.

3. Agreements on the settlements of claims

53. The Government of Japan, while denying any liability to pay compensation, argues in the alternative that compensation claims have in any event been settled or waived through the operation of the peace treaties concluded by Japan following the cession of hostilities. With respect to the claims of Republic of Korea nationals, the Government of Japan relies on article II of the 1965 Settlement Agreement between Japan and Korea under which the parties agreed that "problems concerning property, rights, and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals ... is settled completely and finally" (emphasis added).

54. With respect to other nationals, the Japanese Government has similarly argued that all claims were resolved by the Treaty of Peace that it signed with the Allied Powers in San Francisco on 8 September 1951. Japan's

compensation to the former Allied Powers are set forth in great specificity in article 14 of the treaty. Article 14 also includes a section waiving all claims not set forth in the treaty. Japan relies on the waiver provision to argue that the treaty bars the former "comfort women's" claims. The waiver provision (art. 14 (b)) reads:

> "Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation."

55. The Government of Japan's attempt to escape liability through the operation of these treaties fails on two counts: (a) Japan's direct involvement in the establishment of the rape camps was concealed when the treaties were written, a crucial fact that must now prohibit on equity grounds any attempt by Japan to rely on these treaties to avoid liability; and (b) the plain language of the treaties indicate that they were not intended to foreclose claims for compensation by individuals for harms committed by the Japanese military in violation of human rights or humanitarian law.

56. At the time these and other post-war treaties were signed, the Japanese Government concealed the extent of the Japanese military's involvement in the horrifying treatment of the "comfort women." 82/ Although there was clearly ample knowledge within Korea, the Philippines, China and Indonesia that women and girls had been enslaved and raped during the war, the systemic involvement of the Japanese Imperial Army was concealed by Japan following the war. Private "entrepreneurs", rather than the Japanese military, were suspected and often blamed for the emergence of these rape centres.

57. Given that the Japanese Government hid its involvement in these crimes for such a long time and, indeed, continues to deny legal liability for them, it is improper for Japan to argue that the settlement agreements or any other post-war treaties were intended to resolve all claims involving the "comfort women". The signatories could not have contemplated resolving claims for actions that were not, at the time, believed to be connected directly to the Japanese military.

58. It is also self-evident from the text of the 1965 Agreement on the Settlement of Problems concerning Property and Claims and on Economic Cooperation between Japan and the Republic of Korea that it is an economic treaty that resolves "property" claims between the countries and does not address human rights issues. 83/ There is no reference in the treaty to "comfort women", rape, sexual slavery, or any other atrocities committed by the Japanese against Korean civilians. Rather, the provisions in the treaty refer to property and commercial relations between the two nations. In fact, Japan's negotiator is said to have promised during the treaty talks that Japan would pay the Republic of Korea for any atrocities inflicted by the Japanese upon the Koreans. 84/

59. Moreover, it is clear from the outline of claims presented by the Korean representatives to Japan that "nothing in the negotiations concerns violations of individual rights resulting from war crimes, crimes against humanity,

breaches of the slavery convention, the convention against the traffic in women, or customary norms of international law." 85/ And while Japan did make explicit apologies and agree to pay personal injury compensation in its treaties with Western powers, it did not do so with the Koreans. 86/ The generic use of the term "claims" under article II of the Settlement Agreement must therefore be read in the context of this factual background. Clearly, the funds provided by Japan under the Settlement Agreement were intended only for economic restoration and not individual compensation for the victims of Japan's atrocities. As such, the 1965 treaty - despite its seemingly sweeping language - extinguished only economic and property claims between the two nations and not private claims, and Japan must still be held responsible for its actions. 87/

60. As noted above, the plain language of article 14 (b) of the 1951 peace treaty waives all reparations claims and other claims of the Allied Powers and their nationals arising out of actions taken by Japan and its nationals during the war ... (emphasis added)." By distinguishing between the claims for "reparations" and "other claims", this language clearly indicates that the waiver does not apply to compensation of the Allied Powers' nationals. The only reparations contemplated in the waiver are those of the Allied nations themselves. The only claims of the Allied Powers' nationals contemplated by the waiver are those "other" than reparations. Thus, the claims for compensation by the former "comfort women" are not barred by the waiver at all because they do not fall within the claims discussed in the treaty.

61. In addition, although China is not a signatory to the 1951 peace treaty, the treaty does discuss China's rights vis-à-vis Japan following the war. Interestingly, the treaty states in article 21 that China is entitled to benefits under article 14 (a) (2), which sets forth the specific reparations owed by Japan, but does not state specifically that China is subject to the waiver provision in article 14 (b). Because the waiver does not apply to China, there is no basis for the Japanese Government to argue that the treaty bars Chinese nationals from seeking reparations from Japan.

62. As with the 1965 Settlement Agreement between Japan and Korea, moreover, the interests of equity and justice must prevent Japan from relying on the 1951 peace treaty to avoid liability when the Japanese Government failed to reveal at the time of the treaty the extent of the Japanese military's involvement in all aspects of the establishment, maintenance and regulation of the comfort stations. 88/ As an additional principle of equity, when *jus cogens* norms are invoked, States that stand accused of having violated such fundamental laws must not be allowed to rely on mere technicalities to avoid liability. And, in any event, it must be emphasized that Japan may always voluntarily set aside any treaty-based defences to liability that may be available to them in order to facilitate actions that are clearly in the interests of fairness and justice.

C. Recommendations

1. The need for mechanisms to ensure criminal prosecutions

63. The United Nations High Commissioner for Human Rights should work for the prosecution in Japan, and in other jurisdictions, of those responsible for

the atrocities that have now been clearly linked to the actions of the Japanese military in establishing the Japanese rape camps. It is incumbent upon the United Nations to ensure that Japan fully satisfies its obligation to seek out and prosecute all those responsible for the "comfort stations" who remain alive today and that other States similarly do all they can to assist in the capture and prosecution of offenders in other jurisdictions. Accordingly, the High Commissioner, together with Japanese officials, should work to: (a) gather evidence on individual military and civilian personnel who may have established, supported or frequented Japanese rape centres during the Second World War; (b) interview victims; (c) forward the preparation of cases for trial to Japanese prosecutors; (d) work with other States and survivors' organizations to identify, arrest and prosecute offenders within their jurisdictions; and (e) assist States in any way in the development of legislation to allow such prosecutions in their jurisdictions.

2. The need for mechanisms to provide legal compensation

64. The Sub-Commission has joined other United Nations bodies in "welcoming" the creation in 1995 of the Asian Women's Fund. The Asian Women's Fund was established by the Japanese Government in July 1995 out of a sense of moral responsibility to the "comfort women" and is intended to function as a mechanism to support the work of NGOs that address the needs of the "comfort women" and to collect from private sources "atonement" money for surviving "comfort women". 89/ The Asian Women's Fund does not, however, satisfy the responsibility of the Government of Japan to provide official, legal compensation to individual women who were victims of the "comfort women" tragedy, since "atonement" money from the Asian Women's Fund is not intended to acknowledge legal responsibility on the part of the Japanese Government for the crimes that occurred during the Second World War.

65. Because the Asian Women's Fund does not in any sense provide legal compensation, a new administrative fund for providing such compensation should be established with appropriate international representation. To accomplish this, the United Nations High Commissioner for Human Rights should also appoint, together with the Government of Japan, a panel of national and international leaders with decision-making authority to set up a swift and adequate compensation scheme to provide official, monetary compensation to the "comfort women". Accordingly, the role of this new panel would be to: (a) determine an adequate level of compensation, looking to compensation that may have been provided in comparable settings as guidance; (b) establish an effective system for publicizing the fund and identifying victims; and (c) establish an administrative forum in Japan to expeditiously hear all claims of "comfort women". 90/ Such steps, moreover, should be taken as quickly as possible in light of the advancing age of the comfort women.

3. Adequacy of compensation

66. An appropriate level of compensation should be based on considerations such as the gravity, scope and repetition of the violations, the intentional nature of the crimes committed, the degree of culpability of public officials who violated the public trust, and the extensive time that has passed (and thus the loss of the present value of the money, as well as the psychological harm caused by the extensive delay in relief). In general, compensation

applies to any economically assessable damage, such as physical or mental harm; pain, suffering and emotional distress; lost opportunities, including education; loss of earnings and earning capacity; reasonable medical and other expenses of rehabilitation; harm to reputation or dignity and reasonable costs and fees of legal or expert assistance to obtain a remedy. Based on these factors, an adequate level of compensation should be provided without further delay. 91/ Some consideration should also be given to the level of compensation that may be required to act as a deterrent to ensure that such abuses will not occur in the future.

4. Reporting requirements

67. Finally, the Government of Japan should be required to submit a report to the United Nations Secretary-General at least twice a year detailing the progress that has been made in identifying and compensating the "comfort women" and in bringing perpetrators to justice. The report should also be made available in both Japanese and Korean and distributed actively both within and outside of Japan, particularly to the "comfort women" themselves and in the countries where they currently reside.

VII. CONCLUSION

68. The present report concludes that the Japanese Government remains liable for grave violations of human rights and humanitarian law, violations that amount in their totality to crimes against humanity. The Japanese Government's arguments to the contrary, including arguments that seek to attack the underlying humanitarian law prohibition of enslavement and rape, remain as unpersuasive today as they were when they were first raised before the Nürnberg war crimes tribunal more than 50 years ago. In addition, the Japanese Government's argument that Japan has already settled all claims from the Second World War through peace treaties and reparations agreements following the war remains equally unpersuasive. This is due, in large part, to the failure until very recently of the Japanese Government to admit the extent of the Japanese military's direct involvement in the establishment and maintenance of these rape centres. The Japanese Government's silence on this point during the period in which peace and reparations agreements between Japan and other Asian Governments were being negotiated following the end of the war must, as a matter of law and justice, preclude Japan from relying today on these peace treaties to extinguish liability in these cases.

69. The failure to settle these claims more than half a century after the cessation of hostilities is a testament to the degree to which the lives of women continue to be undervalued. Sadly, this failure to address crimes of a sexual nature committed on a massive scale during the Second World War has added to the level of impunity with which similar crimes are committed today. The Government of Japan has taken some steps to apologize and atone for the rape and enslavement of over 200,000 women and girls who were brutalized in "comfort stations" during the Second World War. However, anything less than full and unqualified acceptance by the Government of Japan of legal liability and the consequences that flow from such liability is wholly inadequate. It must now fall to the Government of Japan to take the necessary final steps to provide adequate redress.

Notes*

1/ This term has obvious derogatory connotations and is used solely in its historical context as the term assigned to this particular atrocity. In many ways, the unfortunate choice of such a euphemistic term to describe the crime suggests the extent to which the international community as a whole, and the Government of Japan in particular, has sought to minimalize the nature of the violations.

2/ Statement by Japanese Prime Minister Tomiichi Murayama, July 1995, reprinted in Asian Women's Fund (an official programme description). See also Japan's policy on the issues of violence against women and "comfort women" (E/CN.4/1996/137, annex) submitted to the Commission on Human Rights at its fifty-second session.

3/ Asian Women's Fund, ibid.

4/ Ibid.

5/ Karen Parker and Jennifer F. Chew, "Compensation for Japan's World War II war-rape victims", Hastings International and Comparative Law Review, vol. 17, 1994, pp. 497, 498-499.

6/ Ibid., p. 499 and note 6 (citing a 1975 statement by Seijuro Arahune, Liberal Democratic Party member of the Japanese Diet, that 145,000 Korean sex slaves had died during the Second World War).

7/ Ibid.

8/ The First Report on the Issue of Japan's Military "Comfort Women", Centre for Research and Documentation on Japan's War Responsibility, 31 March 1944, pp.3-4.

9/ Ibid.

10/ Ibid., pp.5-16 and E/CN.4/1996/137, annex. See also Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 83rd session, 1996, report III (Part 4A), paras. 103-107, 114.

11/ R. Jackson, The Nuremberg Case xiv-xv, 1971 (citing the The Final Report to the President on the Nuremberg Trials).

12/ See Parker and Chew, supra note 5, p. 521 and note 135; Bassiouni, main report, note 14.

13/ See generally Renee Colette Redman, "The League of Nations and the right to be free from enslavement: the first human right to be recognized as customary international law", Chicago-Kent Law Review, vol. 70, 1994, pp. 759,

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* References already cited in the main report are not duplicated in the appendix; the reader is referred to the appropriate note in the main report.

760; Slavery, report submitted by Benjamin Whittaker, Special Rapporteur of the Sub-Commission (United Nations publication, Sales No. E.84.XIV.1), updating the Report on Slavery by Mohamed Awad, submitted to the Sub-Commission in 1966 (United Nations publication, Sales No. E.67.XIV.2).

14/ Humphrey, main report, note 33.

15/ The Lawrence, case cited in J.B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, vol. 3, 1989, pp. 2824, 2825.

16/ M. Cherif Bassiouni, International Crimes: Digest/Index of International Instruments 1815-1985, vol. 1, 1986, p. 419 and main report, note 14 (detailing the incremental history of the international abolition of slavery).

17/ See International Fellowship of Reconciliation, Recommendations to Japan on "sexual slavery", 7 February 1994 (communication to the Government of Japan).

18/ Bassiouni, main report, note 14.

19/ Ibid., pp. 283-287 (noting that although enslavement was not specifically addressed in Japanese criminal law prior to 1944, the crime of enslavement was subsumed under applicable crimes of kidnapping and forcible confinement).

20/ See, e.g., The First Report on the Issue of Japan's Military "Comfort Women", supra note 8, p. 79; see also Redman, supra note 13, p. 763 (stating that the Slavery Convention became customary international law as of 1937).

21/ See also Finn Seyersted, United Nations Forces in the Law of Peace and War, 1966, pp. 180-182.

22/ Trial of the Major War Criminals Before the International Military Tribunal, vol. 1, p. 218.

23/ General Assembly resolution 95 (I) of 11 December 1946 entitled, "Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal"; General Assembly document A/64/Add.1 of 1946; Yvonne P. Hsu, "'Comfort women' from Korea: Japan's sex slaves and the legitimacy of their claims for reparations", Pacific Rim Law and Policy Journal, vol. 2, 1993, pp. 97, 110; The First Report on the Issue of Japan's Military "Comfort Women", supra note 8, p. 76.

24/ See generally Meron, main report, note 25; Frits Kalshoven, article 3 of the Convention (IV) concerning the Laws and Custom of War on Land, signed at The Hague, 18 October 1907, in "Remembering what we have tried

to forget", ASCENT, 1997, pp. 16-30.

25/ See John A. Appleman, Military Tribunals and International Crimes, 1954, p. 299 (citing the 1946 case of Washio Awachi in Batavia, Indonesia, which recognized enforced prostitution as an offence); Hsu, supra note 23, pp. 109-110; Meron, main report, note 25, p. 426, note 13; Verdict 231 of the Temporary Court-Martial in Batavia (designating as war crimes "abduction of girls and women for forced prostitution", "coercion to prostitution" and "rape" and convicting several defendants on those grounds).

26/ See Hsu, supra note 23, p. 107 (citing "family honour" language in support of the argument that international law forbade abuses of comfort women); U. Dolgopol and S. Paranjape, main report, note 48, p. 160 ("The concept of family honour includes the right of women in a family not to be subjected to the humiliating practice of rape".).

27/ Pictet, main report, note 51, p. 201, note 1 (stating that the provisions of article 27 of the Geneva Convention had their origin in article 46 of the Hague Convention Regulations); Theodor Meron, Human Rights and Humanitarian Norms as Customary Law (Oxford: Clarendon Press, 1989), p. 47.

28/ See, e.g., Hsu, supra note 23, p. 111 and note 97 (arguing that the Geneva Convention is merely a codification and extension of pre-existing customary international law); Pictet, main report, note 51, p. 205 (stating that the provision regarding the protection of women was based on a provision introduced into the Prisoners of War Convention in 1929).

29/ See the discussion in the main report.

30/ Meron, main report, note 25.

31/ Rape and Sexual Assault, main report, note 10.

32/ The First Report on the Issue of Japan's Military "Comfort Women", supra note 8, p. 76.

33/ See generally Bassiouni, main report, note 26, pp. 114-139; Appleman, supra note 25, pp. 46-53; Hsu, supra note 23, p. 109, note 84.

34/ Views of the Government of Japan on the addendum 1 (E/CN.4/1996/53/Add.1) to the report presented by the Special Rapporteur on violence against women. Document circulated informally by the Government of Japan at the fifty-first session of the Commission on Human Rights, pp. 15-19, 23.

35/ Ibid., p. 24.

36/ See Japan Federation of Bar Associations (JFBA), Recommendations

on the Issue of "Comfort Women", January 1995, p. 26; David Boling, "Mass rape, enforced prostitution, and the Japanese Imperial Army: Japan eschews international legal responsibility", Columbia Journal of Transnational Law, vol. 32, 1995, pp. 533, 545.

37/ JFBA, ibid.

38/ L. Oppenheim, International Law: A Treatise, H. Lauterpacht (ed.), 7th ed. (London, New York: Longmans Green, 1948-1952), sect. 153.

39/ See Christopher N. Crowe, "Command responsibility in the former Yugoslavia: the chances for successful prosecution", University of Richmond Law Review, vol. 29, 1994, pp. 191, 192; Security Council resolution 827 (1993).

40/ Crowe, ibid. (citing Report presented to the preliminary peace conference, in Leon Friedman (ed.), The Law of War: A Documentary History, vol. 1 (New York: Random House, 1972), pp. 842-853-854).

41/ L.C. Green, "Command responsibility in international humanitarian law", Transnational Law and Contemporary Problems, vol. 5, 1995, pp. 319, 320.

42/ Crowe, supra note 39, p. 194.

43/ See generally Anthony D'Amato, "Superior orders vs. command responsibility", American Journal of International Law, vol. 80, 1986, p. 604; The Llandovery Castle case. Judgement in the case of Lieutenants Dithmar and Boldt, Supreme Court of Leipzig, 16 July 1921. Reprinted in American Journal of International Law, vol. 16, 1922, p. 708.

44/ See "Complaint" <http://www.peacenet.or.kr/~jdh/e_comfort/library/complaint/comp.htm.

45/ See generally Theodor Meron, "International criminalization of internal atrocities", American Journal of International Law, vol. 89, 1995, p. 554; Filartiga v. Pena-Irala, 630F.2nd876 (United States 2nd Cir. 1980).

46/ Meron, ibid., p. 569.

47/ See Regina v. Finta, 88 C.C.C. 3d.417 (1994).

48/ Ibid.

49/ See also Friedl Weiss, "Time limits for the prosecution of crimes against international law", British Yearbook of International Law, vol. 53, 1982, pp. 163, 185.

50/ Fédération nationale des déportés et internés résistants et patriotes v. Barbie in International Law Review, main report, note 70.

51/ Oppenheim, supra note 38, sect. 140.

52/ Ibid., sect. 151.

53/ Ibid., sect. 150.

54/ There may be some small number of cases in which the Japanese military cannot be held directly liable for the treatment of women in the third category of comfort stations. In these cases, the military may, however, still be held liable under a theory of "vicarious liability", which as defined by Oppenheim (ibid., sect. 149) applies to "certain unauthorized injurious acts of [States'] agents, of their subjects, and even of such aliens as are for the time living within their territory".

55/ Kalshoven, supra note 24, p. 9.

56/ See E/CN.4/Sub.2/1996/17; the JBFA (supra note 36, pp. 22-25) has recognized that these principles impose upon Japan a responsibility to make reparations to the comfort women.

57/ Janes case (United States v. Mexico), United Nations Reports of International Arbitral Awards, vol. 4, 1926, p. 82.

58/ Ibid., p. 82.

59/ Ibid., p. 89.

60/ Views of the Government of Japan, supra note 34, pp. 28-32.

61/ Oppenheim, supra note 38, sects. 1, 7.

62/ Kalshoven, supra note 24, p. 11.

63/ Ibid.

64/ Ibid.

65/ Ibid., pp. 12-13.

66/ Ibid., p. 12.

67/ Ibid.

68/ Chorzów Factory (Merits), Permanent Court of International Justice (PCIJ), Judgement No. 13, Series A, No. 8-17, 1927, p. 29. See also the van Boven study.

69/ PCIJ Advisory Opinion No. 15, Series B, No. 15, pp. 17-18.

70/ The agreements with Greece, the United Kingdom, Switzerland, Sweden and Denmark all include provisions for compensation for personal injuries, while settlements with Japan's formerly occupied territories typically make no similar reference. Hsu, supra note 23, pp. 103-104.

71/ Richard B. Lillich and Burns H. Weston, International Claims, Their Settlement by Lump Sum Agreements. Part II: The Agreements (Charlottesville: Univ. Press of Virginia. 1975), pp. 334, 231, 249.

72/ "Claim for Compensation of Pusan Comfort Women and Women's Voluntary Labor Corps and Demand for Official Apology to the Women's Voluntary Labor Corps and to the Comfort Women", Decision of 27 April 1998 (following oral arguments of 29 September 1997), Shimonoseki Branch, Yamaguchi District Court (unofficial translation).

73/ Ibid.

74/ Ibid.

75/ Ibid. See Dan Grunebaum, "WWII sex slaves win historic lawsuit", United Press International, 28 April 1998.

76/ Boling, supra note 36, p. 545.

77/ See "Eight Dutch citizens sue Japan over war", New York Times, 26 January 1994, p. A 9. The plaintiffs include at least one victim of the comfort stations.

78/ See "Two Chinese wartime sex slaves to testify in court", Japan Economic Newswire, 3 July 1996.

79/ See "Japan-based Korean 'comfort women' rape fund scheme", Asian Political News, 15 July 1996.

80/ See Dolgopol and Paranjape, main report, note 48.

81/ See "Former 'comfort women' testify in court", The Daily Yomiuri, 20 July 1996, p. 2.

82/ See Parker and Chew, supra note 5, p. 502.

83/ See Tong Yu, "Reparations for former comfort women of World War II", Harvard International Law Journal, vol. 36, 1995, pp. 528, 535-536.

84/ See Hsu, supra note 23, p. 118.

85/ See Dolgopol and Paranjape, main report, note 48.

86/ See Hsu, supra note 23, pp. 103-104.

87/ See Parker and Chew, supra note 5, p. 538; Dolgopol and Paranjape, main report, note 48, pp. 164-165.

88/ See Yu, supra note 83, p. 535.

89/ Asian Women's Fund, supra note 2, p. 1.

90/ See Dolgopol and Paranjape, main report, note 48.

91/ See Parker and Chew, supra note 5, pp. 544-545.